

DECISION NO. 2009-WIL-028(a)

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

BETWEEN:	Dale F. Anderson	APPELLANT
AND:	Regional Manager	RESPONDENT
BEFORE:	A Panel of the Environmental Appeal Board Carol Brown, Panel Chair	
DATE:	Conducted by way of written submissions, concluding on December 3, 2009	
APPEARING:	For the Appellant: Dale F. Anderson For the Respondent: Wayne Stetski	

APPEAL

[1] Dale Anderson appeals the August 19, 2009 decision of Wayne Stetski, Regional Manager, Recreational Fisheries and Wildlife Programs ("Regional Manager"), Kootenay Region, Ministry of Environment ("Ministry"), denying Mr. Anderson a disabled hunting permit for certain areas. Specifically, Mr. Anderson sought a permit to be exempt from the *Motor Vehicle Prohibition Regulation*, B.C. Reg. 196/99 in Management Unit ("MU") 4-3 and MU 4-22. An exemption permit would allow him to use a motor vehicle to access certain areas that are otherwise subject to "motorized access closures". Mr. Anderson was granted a permit for MU 4-3. However, Mr. Anderson's application for a disabled hunting permit for specified areas in MU 4-22 was denied, which is now the subject of the appeal. Mr. Anderson's application for the permit was based upon his physical disability, which is not in dispute.

[2] 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*. 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.

[3] Mr. Anderson seeks an order from the Board reversing the Regional Manager's decision, and granting him a permit for the requested areas of MU 4-22.

BACKGROUND

[4] According to the Regional Manager's submissions to the Board, motorized access closures implemented by the Ministry are of two types: Motor Vehicle for Hunting Closed Areas ("MVHCAs") and Access Management Areas ("AMAs"). MVHCAs are used to support the Ministry's policy to reduce hunting pressure within a geographic area. AMAs are used to support the Ministry's policy to manage motor vehicle use in order to protect fish and wildlife populations. The areas that are designated under the AMA category are considered to be more ecologically sensitive.

[5] Based on the Regional Manager's submissions, Mr. Anderson applied for a permit to be exempt (on the grounds of disability) from the *Motor Vehicle Prohibition Regulation* in two MUs: MU 4-3 and MU 4-22. One of Mr. Anderson's applications was permitted, allowing him to have motorized access in the Hall/Cherry Creek MVHCA in MU 4-3. However, his applications for motorized access into certain areas of MU 4-22 were denied. In particular:

- He was denied a motorized access permit for Quinn Creek/Alpine Creek, based on the Ministry's position that, although it is a designated MVHCA, it is an area of transition to AMA.
- He was denied a motorized access permit for Pickering Hill and Sheep Mountain, based on the Ministry's position that it is currently a designated AMA.
- The Ministry denied him motorized access to "Upper Bull Main Road" stating that "The Ministry is uncertain which area he [Mr. Anderson] is referring to, as no motorized access closure exists by this name".

Mr. Anderson is appealing the Ministry's decision respecting Quinn Creek and "Upper Bull Main Road". He states that he would like permission to drive into these areas for the purpose of hunting for his winter meat. He states that "without my handicap I was always able to hunt these areas by walking into them."

[6] Section 3(2)(a) of the *Permit Regulation*, B.C. Reg. 253/2000 authorizes a regional manager to issue permits that exempt a person from the prohibition in section 3 of the *Motor Vehicle Prohibition Regulation*, which prohibits the operation of a motor vehicle in areas where the Ministry has designated motorized access closures.

[7] The Ministry has a written policy regarding disabled hunters, which addresses the Ministry's common law duty to accommodate disabled hunters in the provision of its services.

ISSUES

[8] The Panel considered the following issue:

1. Whether the Regional Manager failed to accommodate Mr. Anderson as a disabled hunter by refusing to grant an exemption from the *Motor Vehicle Prohibition Regulation* for Quinn Creek and Upper Bull Main Road in MU 4-22 and/or by failing to engage the Appellant in discussions to determine whether there are alternative areas that might be permitted.

RELEVANT LEGISLATION

[9] The Regional Manager's permitting authority is set out in the following sections of the *Wildlife Act* and the regulations enacted pursuant to it:

Wildlife Act, R.S.B.C. 1996, c. 488**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.

...

- (4) The regional manager or the person authorized by the regional manager may amend the conditions of a permit as determined by him or her and issued under this section, but the amendment is not effective until the permittee has notice of it.

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, ... or

(b) an application by a person for anything referred to in paragraph (a).

Permit Regulation, B.C. Reg. 253/2000**Exemptions by permit**

- 3 (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.

Motor Vehicle Prohibition Regulation, B.C. Reg. 196/99**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

Whether the Regional Manager failed to accommodate Mr. Anderson as a disabled hunter by refusing to grant an exemption from the *Motor Vehicle Prohibition Regulation* for Quinn Creek and Upper Bull Main Road in MU 4-22 and/or by failing to engage the Appellant in discussions to determine whether there are alternative areas that might be permitted.

The Duty to Accommodate

[10] The duty to accommodate is clear in Canadian human rights law: employers, service providers and regulators must accommodate persons with disabilities, unless there is a *bona fide* reason to deviate from this principle (see *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 615 [*Via Rail*]). The law suggests that "undue hardship" is the test: the question then becomes whether the duty to accommodate Mr. Anderson places undue hardship on the Ministry (*Via Rail*). The law also suggests that what constitutes undue hardship

depends on the circumstances and legislation governing each case. When determining the scope of accommodation required, the nature, legitimacy and strength of the competing interests at stake must be assessed. These competing interests must then be balanced against the right of persons with disabilities to be free from discrimination.

[11] In the context of the *Wildlife Act*, the Ministry must balance the competing interests between a hunter with physical disabilities and the preservation of the environment. The Ministry has outlined its policy with respect to this duty to accommodate in the Ministry's Procedure Manual. This policy was considered by the BC Human Rights Tribunal and found to take into consideration the Ministry's legal obligation not to discriminate contrary to the *Human Rights Code*, R.S.B.C. 1996, c. 210 (see *Hall v. B.C. (Ministry of Environment)* (No. 5), 2009 BCHRT 389). Neither party provided a copy of the Ministry's policy to the Panel. However, the policy was set out in the *Hall* decision, and has been summarized in a previous decision of this Board in *Chanski v. Regional Manager* (Decision No. 2007-WIL-009(a), March 7, 2008). The policy sets out the following process to be followed by a decision maker considering a road closure exemption application:

- a. Identify the value(s) that motivated the closure; for example protecting the environment in a sensitive area;
- b. Consider the specific circumstances and the value of participation to each applicant;
- c. Assess the impact of allowing motor vehicle access to the applicant on the environment, and determine whether the standard of "undue hardship" has been met;
- d. If motor vehicle access is allowed, determine how to minimize environmental impact, if possible, putting the permit holder on equal footing with persons not receiving exemptions;
- e. If the permit is denied completely, or most of the application areas have been denied, engage the applicant to attempt to find alternative accommodation such as other closed areas more likely to be permitted; and
- f. Document all efforts to accommodate and give written reasons.

[12] The Panel agrees that these factors provide an appropriate framework within which to consider whether the Ministry has met its duty to accommodate Mr. Anderson.

The Parties' Submissions

[13] Mr. Anderson's submissions consisted of his letter, which constituted his Notice of Appeal. Although the Regional Manager's decision denied access to Alpine Creek as well as Quinn Creek and Upper Bull Main Road (among others), Mr. Anderson's letter clarifies that he only seeks an exemption permit to access Quinn Creek and "Bull River Main (Upper Bull)". He states that "this is the main fork for these two closures" and that the Regional Manager's decision to deny him motorized access is unfair. Mr. Anderson explains that he used to be able to walk

into these areas to hunt for his winter's meat. Now, with his disability, he is no longer able to do so.

[14] Mr. Anderson argues that these two drainages are only closed for the hunting season. He states that the access roads are "well travelled" except in hunting season and winter. His point seems to be that these areas fit into the first category of road closure policy: MVHCA's, whereby the Ministry seeks to reduce the hunting pressure within a geographic area. Indeed, the Regional Manager agrees with this. In his submissions, the Regional Manager notes that the current designation of the Quinn Creek area is MVHCA. However, the Regional Manager notes that the Quinn Creek area:

has been proposed to be converted to an AMA, as soon as field assessments are completed by the Ecosystems Section, Environmental Stewardship Division, Kootenay Region. Unfortunately, due to operational constraints, field assessments were not completed during the summer of 2009. ... it is anticipated that surveys will be completed during the summer of 2010. This area contains high value moose, rutting areas for Rocky Mountain elk and the area is a major migration corridor for ungulates between the Bull River, Upper Quinn Creek and the Whiteswan River drainage via Blackfoot Creek.

[15] In his submissions, the Regional Manager provided the Panel with information regarding the treatment of other applications by disabled hunters for motorized access to MVHCAs that are in the process of being converted to an AMA designation, pending field assessments by the Ecosystems Section. He states, "In total, there have been 51 disabled hunting requests for motorized access into these 'transition MVHCAs' (i.e. conversion to AMA status to reflect higher environmental risks) and only 2 have received approval." He provides no explanation for why those two were approved but the others were refused.

The Panel's Findings

[16] It seems from the Regional Manager's submissions that there was some confusion as to what areas Mr. Anderson was applying for. Based on Mr. Anderson's letter to the Board, the Panel finds that Mr. Anderson seeks an exemption permit for two areas: the Quinn Creek area of MU 4-22 and the Upper Bull Main Road area of MU 4-22.

1. The Quinn Creek MVHCA

[17] The Quinn Creek area is currently a designated MVHCA. This designation is found in Schedule 2 of the *Motor Vehicle Prohibition Regulation*: section 9(h) of Schedule 2 identifies it as "that portion of M.U. 4-22 being the watershed of Quinn Creek upstream of its confluence with Alpine Creek and including the watershed of Alpine Creek". This is the reason Mr. Anderson requires an exemption. However, according to the Regional Manager, this designation is in transition to an AMA.

[18] The case of *Hall v. B.C. (Ministry of Environment)* clearly articulates the Ministry's duty to accommodate a disabled hunter's ability to participate in regular hunting activities. The Ministry is required to accommodate a disabled hunter to a point of "undue hardship", which is reached when protection of the environment

outweighs the goal of equal participation. The Regional Manager must balance the value of equal participation with the value of ecological sensitivity.

[19] In *Hall v. B.C. (Ministry of Environment)*, the Human Rights Tribunal also notes that when an applicant is denied a permit in respect of a significant number of areas applied for, the Ministry has a duty to engage the applicant in an attempt to determine alternate accommodation (p. 23). According to the Regional Manager, Mr. Anderson applied for four areas, and was granted a permit for only one area.

[20] Although the Ministry has not yet designated the Quinn Creek MVHCA as an AMA, the Panel accepts the Ministry's submissions that this is considered to be a sensitive area which will undergo full investigation as soon as is practical. The Panel finds that the Ministry's approach to this area has been consistently applied to other hunters and that it is willing to grant an exemption to disabled hunters in certain limited cases (two in 2009) after balancing the respective impacts and assessing undue hardship.

[21] In the present case, the Panel agrees that allowing Mr. Anderson motor vehicle in to the Quinn Creek area would constitute undue hardship.

2. Upper Bull Main Road

[22] Mr. Anderson referred to the Upper Bull Main Road in his permit application and his appeal, and the Regional Manager is uncertain as to which area Mr. Anderson is referring to. Clearly, the Ministry's own policy supports the decision made in the *Hall* case to engage an applicant in an attempt to provide alternate accommodation. The Panel has no evidence to support that the Ministry met its duty to accommodate Mr. Anderson by engaging him in discussions in order to determine alternate accommodation.

[23] The Panel finds that the matter should be referred back to the Regional Manager, with directions to engage with Mr. Anderson as to what area he is referring to. Also, the Panel directs the Regional Manager to engage in conversation as to possible alternatives, if the area sought by Mr. Anderson requires an exemption, in order to meet the Ministry's duty to accommodate.

DECISION

[24] 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 referred to here.

[25] For the reasons stated, with respect to Mr. Anderson's application for a permit exempting him from the motorized vehicle prohibition over the Quinn Creek MVHCA of MU 4-22, the Panel finds that the Regional Manager's decision should be confirmed.

[26] With respect to Mr. Anderson's application for a permit exempting him from the motorized vehicle prohibition over the "Upper Bull Main Road" area of MU 4-22, the Panel finds that the matter should be referred back to the Regional Manager, with directions to engage with Mr. Anderson as to what area he is referring to.

Also, the Panel directs the Regional Manager to engage in conversation as to possible alternatives in order to meet the Ministry's duty to accommodate.

[27] Accordingly, the appeal is allowed, in part.

"Carol Brown"

Carol Brown, Panel Chair
Environmental Appeal Board

March 31, 2010