BRITISH COLUMBIA

Environmental Appeal Board

Fourth Floor, 747 Fort Street
Victoria BC V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

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

Website: www.eab.gov.bc.ca
Email: eabinfo@gov.bc.ca

DECISION NO. 2018-WIL-008(a)

In the matter of an appeal under section 105 of the *Wildlife Act*, R.S.B.C. 1996, c. 488.

BETWEEN:	Abraham Dougan	**APPELLANT**
AND:	Deputy Director of Wildlife and Habitat	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board: Susan E. Ross, Panel Chair	
DATE:	Conducted by written submissions concluding on November 7, 2019.	
APPEARING:	For the Appellant: Kevin Church, Counsel For the Respondent: Stephen E. King, Counsel	

APPEAL

[1] The Appellant appeals an administrative decision made under subsections 24(2) and (5) of the *Wildlife Act*, R.S.B.C. 1996, c. 488, ordering the cancellation of any hunting licences held by him, and a two-year prohibition on hunting and his eligibility to apply for hunting licences or authorizations (the "Decision").

[2] The Appellant is a long-time hunter and guide outfitter in this province. The Respondent and decision-maker is the Deputy Director of the Wildlife and Habitat Branch, Penny Lloyd (the "Director").

[3] The Decision is based upon several serious recreational and guided hunting violations that resulted in findings of guilt and convictions of offences by courts, as well as a history of other compliance issues identified by conservation officers. Although the Appellant is a professional guide outfitter, these proceedings under section 24 relate to his hunting privileges; they are not against his guide outfitter certificate or licence under section 61 of the *Wildlife Act*.

[4] The Appellant seeks a reversal of the Decision on the grounds that the Director's administrative proceedings are barred by the eighteen-month limitation period in section 103(1) of the *Wildlife Act*. He also contends that the Decision should be reversed under sections 7, 11(b) and (h) of the *Charter of Rights and Freedoms* (the "*Charter*") and the principles of issue estoppel and abuse of process because of:

- delay in some of the court proceedings and in the administrative proceedings;
- duplication between some of the court and administrative proceedings;
- misconduct by conservation and licensing officials; and
- absence of proven substance to other flagged compliance issues.

[5] The Appellant also claims that the Director made errors when considering and weighing relevant factors to arrive at the sanctions ordered in the Decision.

[6] The appeal is made to the Environmental Appeal Board (the "Board") pursuant to section 101.1(1) of the *Wildlife Act*. Section 101.1(4) permits the Board to conduct the appeal by way of a new hearing. Section 101.1(5) gives the Board powers on the appeal to:

- send the Decision back to the Director with or without directions;
- confirm, reverse or vary the Decision; or
- make any decision the Director could have made and that the Board considers appropriate in the circumstances.

[7] The appeal was conducted by written submissions, with the approval of both parties.

The Decision

[8] Subsections 24(2) and (5) of the *Wildlife Act* give the Director the following authority:

> **24**(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.
>
> ...
>
> (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.

[9] The Decision was issued on October 23, 2018, with its sanctions to become effective on January 1, 2019.

[10] The Decision was based on the Director's consideration of certain findings of guilt and convictions by courts related to a recreational 1999 Dall sheep hunt and a guided 2011 big game hunt. In addition, the Director considered previous

compliance issues, including unproven offence changes, identified by conservation officers in the Conservation Officer Online Reporting System ("COORS"). As the Appellant's history of criminal and administrative actions is key to the Decision and many of the issues raised in the appeal, this history is outlined in some detail below.

2015 and 2016 judgments related to a 1999 Dall sheep hunt

[11] In 1999, the Appellant participated in a recreational hunt for Dall sheep that started in northern British Columbia. He harvested a Dall sheep and reported a kill site in the province. In 2002, he sent a photo to a big game records publication of himself with the Dall sheep trophy at the location at which it was shot. It was recorded as the second largest Dall sheep taken in British Columbia.

[12] In 2011, a confidential informant reported that the sheep was, in fact, shot over the border in Yukon, without authorization, and then transported to British Columbia. Using computer simulation tools to narrow down the location of the photo, Yukon and Environment Canada investigators flew and hiked into an area in Yukon where they identified a suspected kill site based upon the terrain and rock formations. In 2012, the Appellant was charged with hunting offences arising from this hunt. The prosecution of the charges was undertaken by federal Crown counsel.

[13] The Appellant pled not guilty to all charges. The trial of four counts under the *Wildlife Act* and the *Wildlife, Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52 ("WAPPRITA") started in the Provincial Court of British Columbia in late 2013, continued in July 2014, and completed in December 2014.

[14] On October 9, 2015, Judge Frame issued two reserved judgments. The first judgment, indexed as *R. v. Dougan*, 2015 BCPC 280, analyzed the merits of the evidence on the charges, including perceived shortcomings in the investigation (the "Merits Judgment"). In terms of the evidence, the case turned on two photographs produced by the prosecution: the photo in the big game records book showing the Appellant with his trophy at the kill site, and a photo of the suspected location of the kill site in Yukon. The big game record book photo and the suspected kill site photo had startling similarities that included an identical immoveable rock in the foreground. The Appellant produced another photograph from a far distant site within British Columbia that had similarities, but also noted dissimilarities, to the photos introduced by the prosecution. He also testified that he had truly and accurately reported the kill site in British Columbia; however, Judge Frame found the similarities between the photographs from the big game records and the suspected kill site to be persuasive. She was satisfied by the immoveable rock feature in the foregrounds of those two photos that they were taken in the same location, in Yukon. She disbelieved the testimonies of both the Appellant and the other hunter who had accompanied him and also claimed the kill site was in British Columbia.

[15] Judge Frame summarized her verdicts of guilt as follows:

> [57] The way this investigation unfolded leaves me with a great deal of discomfort. Discomfort, though, is not reasonable doubt. While the investigation could have been conducted in a much simpler manner and with the process of elimination between the two sites, it is ultimately the photograph of the foreground depicting the identical rock which satisfies me that the Crown has proved this case beyond a reasonable doubt. I find that Mr. Dougan shot the Dall sheep in Yukon Territory, and not in British Columbia. He then transported it to British Columbia to the pick-up point.

[16] In her simultaneously issued second judgment, indexed as *R. v. Dougan*, 2015 BCPC 279, Judge Frame held that the Appellant's right to trial within a reasonable time under section 11(b) of the *Charter* had been infringed. The Court remedied the breach by ordering a judicial stay of all counts (the "Stay Judgment"). This meant that the charges against the Appellant were halted with no convictions entered against him.

[17] The Stay Judgment determined that the time period between the charges and the judgments was 37 months, with unacceptable delay by the Crown and the Court. Judge Frame found prejudice to the Appellant:

- inferred from the length of the delay alone;
- from the "relentless, unceasing" (para. 59) public and media attention to the pending case;
- from the reluctance of some outfitters to use the Appellant's services while the charges were outstanding;
- from wildlife officers involved in the prosecution inadvertently misrepresenting the charges to business associates of the Appellant; and
- from the Appellant's suspicions that the outstanding charges had caused BC licensing officials to deny him an assistant guide outfitter licence, and BC conservation officers to target hunters on a cougar hunt guided by the Appellant.

[18] On the appeal before me, the Appellant emphasizes the last bullet above. This bullet relates to two incidents which require further description. Regarding the assistant guide licence, on June 19, 2013, the Regional Manager of Wildlife denied the Appellant an assistant guide outfitter licence. The decision was made without a hearing. The Appellant immediately filed an appeal to the Board. On July 12, 2013, his appeal was allowed by consent. A consent order approved by the Board directed the Regional Manager to issue the licence without prejudice to later action after a hearing under section 61 of the *Wildlife Act*. The Appellant maintains that the licence was denied, improperly, because of the outstanding Dall sheep hunt charges.

[19] The cougar hunt took place in December 2013. BC Conservation Officer Service ("BC COS") officers attended where the hunting group had parked their trucks and one of the hunters was waiting. The Appellant believes that the BC COS

officers targeted him to discredit him with his clients after the Dall sheep hunt trial had not completed earlier that month.

[20] These two incidents will be discussed further later in the decision.

[21] The Crown appealed the Stay Judgment to the British Columbia Supreme Court, but subsequently abandoned its appeal. The Appellant appealed the Merits Judgment: he wished to be exonerated of the findings of guilt in that judgment.

[22] In October 2016, the Supreme Court dismissed the Appellant's appeal on the ground that he had no right of appeal from Judge Frame's findings of guilt on the merits of the charges tried. In that judgment, indexed as *R. v. Dougan*, 2016 BCSC 2069, Justice Donegan held that the Appellant's right of appeal to the Supreme Court was limited to convictions or final orders. She concluded that the Merits Judgment involved findings of guilt, not convictions for the offences at issue.

[23] Justice Donegan went on to state that, while the findings of guilt "might have an effect on [Mr. Dougan] after the close of the proceedings" (para. 44), they were not a final order or judgment because they did not end the proceedings, which were ended by the Stay Judgment for unreasonable delay. Justice Donegan noted that a right of appeal would only have arisen if the convictions had been entered after a successful Crown appeal of the Stay Judgment. As the Crown put it, the Appellant sought the *Charter* relief he did and "must, therefore, accept both the benefit and the burden of the stay of proceedings" (para. 20).

[24] The result of these three judgments is that, after a lengthy trial and stay application under section 11(b) of the *Charter*, the Appellant was found guilty of four offences under the *Wildlife Act* and WAPPRITA:

- unlawfully transporting a part of an animal out of Yukon without a permit;
- unlawfully transporting a part of an animal between Yukon and British Columbia;
- unlawfully knowingly possessing dead wildlife without authorization under a permit or licence; and
- knowingly making a false statement when reporting the kill site to be in British Columbia when it was, in fact, in Yukon.

[25] No convictions were entered, however, because the proceedings were judicially stayed for infringement of the Appellant's section 11(b) *Charter* right to trial within a reasonable time.

2014 convictions related to a 2011 big game hunt

[26] While the Dall sheep matter was making its way through the British Columbia courts, the Appellant was also dealing with charges related to a guided hunt in 2011 in Yukon.

[27] In August 2014, the Appellant and the hunter he had guided each pled guilty in the Yukon Territorial Court to two 2011 offences under the *Wildlife Act*, R.S.Y. 2002, c. 229, for wasting the meat of two animals and commencing a hunt when

not permitted to do so. Both defendants were represented by counsel. After considering a joint submission with the Crown, the Court sentenced the Appellant to fines of $15,000 and a 20-year prohibition on hunting or guiding in Yukon. The Court stated:

> [13] … Mr. Dougan is the individual in this situation who had the greatest expertise … it is clear that Mr. Abraham Dougan, being a guide for some length of time, having done this work for a period of time, he has a significant responsibility in terms of how this hunt was conducted. Again, he displayed very bad judgment in terms of this hunt.
>
> [14] I take into consideration the guilty pleas that he has entered, the fact that he was cooperative with conservation officers when they commenced their investigation, and that he has expressed remorse through his counsel. I also note that this incident will undoubtedly have a negative impact on his livelihood. I suspect that individuals who might otherwise wish to hire him as a guide may well question his competency as a guide as a result of this incident.
>
> [15] There was significant wastage of animal meat, as indicated by the Crown, and, as a result, the penalties that will be imposed today are significant with respect to Mr. Dougan.

[28] This case is indexed as *R. v. Dougan*, 2014 YKTC 56.

Compliance issues identified by BC conservation officers

[29] COORS tracks incidents and actions respecting potential violations of conservation legislation. The information recorded relates to offences as well as licensing and other administrative actions, both proven and unproven. The Director considered 10 entries in a three-page COORS printout related to the Appellant.

[30] The COORS entries dated back to 1995. There were seven entries regarding administrative actions such as warnings. Three other entries related to a 2015 incident when the Appellant was charged with three offences related to his guiding activities in the province. He was alleged to have allowed a hunter to hunt within six hours of being airborne in an aircraft. The Appellant pled not guilty and the Crown stayed those charges prior to trial.

[31] None of the COORS entries had resulted in actions being taken against the Appellant's hunting or guiding privileges.

Recommendations Package and the Director's Decision-making process

[32] Since delay is a ground of appeal, I will outline the path of the administrative proceedings.

[33] On March 10, 2017, about five months after the Supreme Court dismissed the Appellant's appeal of the Merits Judgment, the BC COS submitted a recommendations report and attached documents (the "Recommendations

Package") to Deputy Director Cole Winegarden. The BC COS recommended that licensing action be taken against the Appellant under section 24 of the *Wildlife Act*.

[34] The Recommendations Package was not the result of new investigations; it was a compilation of information about the Yukon convictions, the Dall sheep hunt findings of guilt, and the COORS printout which the Recommendations Package referred to as the Appellant's "rap sheet". It included the court judgments relating to the convictions and findings of guilt, the Yukon and Environment Canada investigators' briefs to the Crown counsel prosecuting the court cases, and the BC COS's narrative summary and recommendations to the Director.

[35] The BC COS's request for licence action against the Appellant was focused mostly on the Yukon convictions and the Dall sheep hunt findings of guilt. With respect to the COORS "rap sheet", the Recommendations Package stated that the Appellant:

> … has been the subject of multiple investigations which has resulted in a variety of enforcement actions from warnings to charges. The majority of these offences occurred while Dougan was acting as a guide; it is the intention of the COS to address those issues through a section 61 hearing. The two files [Yukon convictions and Dall sheep hunt findings of guilt] referred in this request for licence action have merit because they reflect on Dougan's recreational hunting activities. If the Director feels the guided activities referred to have merit in this matter they can be provided at request.

[36] There is no indication that underlying evidence was requested on the compliance issues flagged on the COORS printout. As a result, the Director considered only the 10 entries on the printout.

[37] On July 31, 2017, Mr. Winegarden sent the Appellant a notice advising that he was considering whether to remove the Appellant's hunting privileges under section 24 of the *Wildlife Act* based upon the information in the enclosed Recommendations Package. The notice informed the Appellant that he was being provided with an opportunity to be heard before Mr. Winegarden made his decision. The notice outlined some of the factors that could be considered and the Appellant may wish to address. Mr. Winegarden also informed the Appellant that:

> I need not limit my considerations to conduct that resulted in a conviction of an offence or conduct that constitutes an offence. In particular, even if you were acquitted or charges were dropped, if the enclosed materials allege that you did something wrong, I intend to consider whether you most likely did or not.

[38] The Appellant was given 30 days to make a submission about whether licensing action should be taken against him.

[39] The Appellant retained legal counsel who immediately requested a time extension to October 31, 2017 for the Appellant to respond to the notice. His request, dated August 3, 2017, explained that both he and his client were not available in August, and wildfires in the interior of the province where both he and the Appellant are based, were impacting his practice and ability to communicate

with his client. The Appellant's counsel also requested access to the complete BC COS investigation record from which the enclosures in the Recommendations Package had been excerpted.

[40] Mr. Winegarden decided those were not sufficient special circumstances or hardship to extend the deadline for the Appellant's response more than 30 days. He also explained that his office would ask the BC COS, which is part of a different ministry than the Director, to provide the requested disclosure materials to the Appellant. When that disclosure was not accomplished until the end of September, Mr. Winegarden allowed the Appellant a further 30-day time extension and his written submission was provided on October 31, 2017.

[41] In January 2018, without having made a decision, Mr. Winegarden changed jobs. The Ministry's efforts to find an alternative decision-maker led to the matter being re-assigned at the end of July 2018 to the Director, Ms. Lloyd, and she issued the 11-page Decision on October 23, 2018.

[42] The result of these various steps is that the Mr. Winegarden received the Recommendations Package within five months of the conclusion of the Dall sheep hunt court proceedings, and he issued the notice of the section 24 proceedings four and a half months after that; the Appellant was eventually allowed three months to respond to that notice, inclusive of two months to receive requested disclosure materials; the Decision was issued 12 months later, prohibiting the Appellant from hunting for two years effective January 1, 2019.

[43] The Director's conclusions in the Decision are summarized as follows:

- The Appellant's allegations that the BC COS had taken "prejudicial and discriminatory" actions against him were irrelevant because the Director's role was "simply to determine if Mr. Dougan did or did not commit the violations alleged against him, and if so, what level of penalties to assess for them" (p. 6).
- The limitation period in section 103 of the *Wildlife Act* did not bar the administrative proceedings.
- The findings of guilt of the four Dall sheep hunt offences were violations that could be taken into account in the administrative proceedings, even though the charges themselves had been judicially stayed for delay.
- The COORS printout consisted of 10 alleged violations of which three were stayed in court, five resulted in written or verbal warnings, one was passed to another jurisdiction, and one resulted in a fine or the withdrawal of charges. None resulted in licensing action.
- The Appellant's Yukon convictions and the COORS printout could also be taken into account in the administrative proceedings. However, since he had been sufficiently penalized for the Yukon convictions ($15,000 fine and 20-year hunting prohibition), and none of the "rap sheet" sheet items resulted in guilty findings or convictions, no additional penalties would be applied for those matters.

[44] The Director's Reasons for Penalty listed a series of considerations, which are summarized as follows:

- The Appellant was an experienced and active hunter who supported his family as a guide outfitter and should have known and abided by the regulations.
- The Dall sheep hunt violations showed the Appellant's serious disregard and disrespect for wildlife conservation and the law.
- The Appellant's denial of all British Columbia charges against him, including those relating to the Dall sheep hunt, showed an unwillingness to accept responsibility for his actions.
- The Director had authority to issue an administrative sanction of up to 30-years duration[1] and to order retaking of the Conservation and Outdoor Recreation Education ("CORE") course.
- Previous licensing cases for contraventions similar to the Dall sheep hunt contraventions had resulted in hunting prohibitions of up to 10-years depending on the number of offences, and sometimes the retaking of the CORE course.
- The seriousness of the offences the Director found the Appellant had committed and had not yet received any licence prohibitions.
- The Appellant did not admit or express remorse for the Dall sheep hunt violations.
- The Appellant likely profited in stature and economically as a guide and hunter from his illegal harvest of the trophy Dall sheep.
- The BC COS recommended a lengthy hunting prohibition.
- The penalty ordered by the Director needed to be an effective deterrent for the Appellant and others.
- The Appellant had already been penalized for the Yukon convictions.
- None of the 10 other alleged British Columbia violations in the COORS printout had resulted in convictions or findings of guilt.
- The Appellant had suffered significant personal and financial damages from the publicity surrounding his lengthy trial of the Dall sheep hunt charges.
- The Dall sheep hunt violations occurred 19 years ago on a recreational hunt.
- Hunting was an extremely important part of the Appellant's, and his family's, lifestyle.

[45] The Decision concluded:

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[1] See *Wildlife Act General Regulation*, B.C. Reg. 340/82, section 7.05.

> I believe that the totality and seriousness of Mr. Dougan's offences warrant consideration of a 4 to 7-year hunting suspension. However, taking into account all of the above, that this is the first time he has been recommended to the Director for licence action in British Columbia, and the importance of hunting to him and his family, I have decided to limit his suspension to two years. (p. 8)

[46] The Director did not require the Appellant to retake the CORE course because she found that he was aware of the hunting regulations and the importance of maintaining good hunting ethics.

The Appeal

[47] The Appellant filed his Notice of Appeal on October 26, 2018, three days after the Decision was issued. He requested an interim stay of the Decision pending the Board's decision on his appeal, pursuant to Rule 16 of the Board's Rules.[2] After submissions were scheduled on the Appellant's interim stay application, the Director ultimately agreed to a voluntary stay of the Decision without the necessity of a Board order. This meant that the Director agreed that she would not enforce the terms of the Decision while the appeal process was underway. As a result, the Appellant has not been required to serve the penalty in the Decision pending the outcome of this appeal.

[48] The evidentiary record before me consists of the Decision, the Affidavit of the Appellant (July 23, 2019) and the Affidavit of the Director (August 21, 2019). The parties have provided me with the judgments respecting the Yukon convictions, the prosecution of the Dall sheep hunt charges, and substantially all of the Recommendations Package.

[49] The Appellant's Affidavit includes a January 20, 2015 affidavit that he swore in support of his application for a judicial stay of the Dall sheep hunt charges (excluding some of its exhibits), and his October 31, 2017 written submission to Mr. Winegarden (excluding its enclosures). It also includes and deposes to the truth of an undated submission from the Appellant to Mr. Winegarden. The Appellant's Affidavit explains that he did not provide other affidavits that he relied on in previous proceedings because he relies on Judge Frame's findings in the Stay Judgment.

[50] The Appellant relies on his October 31, 2017 submission to Mr. Winegarden (statement of points, paras. 20-21); however, I disregarded the parts of that submission which address evidence or issues that were not included in the appeal record or pursued by the Appellant in this appeal.

[51] The Appellant also provided a second COORS printout with seven entries that were not listed in the COORS printout included in the Recommendations Package. As with the first COORS printout, none of the entries in the second COORS printout

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[2] Unlike the judicial stay ordered by Judge Frame, the Board's power to order an interim stay simply prevents the Decision (i.e., the licence cancellation and two-year hunting prohibition) from taking effect until the Board hears the appeal and issues its decision.

resulted in convictions, findings of guilt or licensing action. The Appellant responded to both COORS printouts, but I have not found it necessary to consider those submissions as the COORS printouts, without underlying evidence, were not significant enough to attribute weight to in this case.

[52] The Director's Affidavit explains her Decision and responds to the Appellant's arguments.

ISSUES

[53] I have organized the Appellant's grounds of appeal under the following questions:

1. Should the Decision be reversed because the administrative proceedings are barred by the time limitation in section 103(1) of the *Wildlife Act*?
2. Do the Director's administrative proceedings or Decision violate the Appellant's rights under section 11(b) or (h) or section 7 of the *Charter*?
3. Should the Decision be reversed because of abuse of process from undue delay in the administrative proceedings?
4. Should the Decision be reversed because of misconduct and abuse of process by the BC COS and licensing officials?
5. Should the Decision be reversed because the administrative proceedings duplicate prior court proceedings?
6. Can the Appellant deny or relitigate the criminal court judgments against him?
7. What is an appropriate penalty in the circumstances?

DISCUSSION AND ANALYSIS

1. Should the Decision be reversed because the administrative proceedings are barred by the time limitation in section 103(1) of the *Wildlife Act*?

[54] Section 103(1) of the *Wildlife Act* creates the following limitation period:

> **Time limit for prosecuting offence**
>
> **103**(1) The time limit for laying an information in respect of an offence under this Act is
>
> …
>
> (b) if the minister completes a certificate described in subsection (2), 18 months after the date that facts on which the information is based first came to the knowledge of the minister.

> (2) A document purporting to have been issued by the minister, certifying the date that the facts on which the information is based first came to the knowledge of the minister,
>
> (a) is admissible without proof of the signature or official character of the person appearing to have signed the certificate, and
>
> (b) is proof of the certified matters.

[55] The Appellant submits that this provision bars the Director's administrative proceedings because they were the prosecution of an offence under the *Wildlife Act* and the Director knew the facts underlying the Dall sheep hunt since 2011, far longer than the 18-month limitation period.

[56] This is a sequel to the Appellant's arguments under section 103(1) of the *Wildlife Act*, and a similar provision in WAPPRITA, in the Dall sheep hunt prosecution. Judge Frame rejected this limitation defence after finding that the facts of the alleged offences were first known to conservation officers, and hence their respective ministers, in April 2011, less than 18 months before the charges were laid in September 2012.

[57] In her Decision, the Director concluded that section 103(1) does not apply to proceedings under section 24. I agree. Section 103(1) applies to "laying an information in respect of an offence under this Act." Administrative proceedings do not require the "laying of an information" and are different from the prosecution of offences; therefore, this limitation period does not apply to administrative proceedings. Close reading of section 24, and other provisions in the *Wildlife Act*, bears this out.

[58] Sections 24(2), (5), (12) and (14) of the *Wildlife Act* authorize the Director to cancel or suspend a person's licence or hunting authorization, or bar them from obtaining a licence or hunting authorization, hunting, angling or carrying a firearm. These are administrative actions that result in administrative sanctions applied by Ministry decision-makers like the Director.

[59] Sections 24(8), (10) and (13) automatically cancel or prohibit an offender from holding a licence or hunting authorization from the date of their sentencing upon conviction of specified offences under the *Wildlife Act* or the *Firearm Act*. These are automatically imposed sanctions.

[60] Sections 24(6), (7) and (14) provide that a person commits an offence if they apply for a licence or hunting authorization, hunt, angle or carry a firearm when their licence or hunting authorization is suspended or they are barred from obtaining a licence or hunting authorization, hunting, angling or carrying a firearm. These are offences prosecuted by charges laid by an information, tried by a court on the criminal standard of proof, and subject to the fines and penalties in sections 84 to 84.3 of the *Wildlife Act*. Offences are also prescribed in other provisions of the *Wildlife Act*.

[61] Finally, section 24(15) distinguishes between, and permits both, administrative and offence sanctions:

> The sanctions provided for in this section apply in addition to any fines, penalties, additional fines, prohibitions, directions or requirements that may be imposed under section 84, 84.1, 84.2 or 84.3 [relating to convictions for offences] and whether or not they are requested or ordered at the time of sentencing for an offence.

[62] It is evident that section 24 authorizes the Director to impose (and in some cases automatically imposes) administrative sanctions. Further, it explicitly permits administrative sanctions in addition to sanctions imposed by a court under sections 84 to 84.3 on conviction of an offence under the *Wildlife Act*. To this is added the time limit for "laying an information in respect of an offence under this Act" in section 103(1), and the absence of any prescribed time limit for administrative proceedings under section 24.

[63] I conclude that the *Wildlife Act* distinguishes between administrative actions and offence charges, and that the time limit in section 103(1) applies only to offences: it does not apply to administrative actions, including section 24(2) or (5) proceedings for which there is no statutory limitation period.

[64] I find that the Director's administrative proceedings are not barred by the time limitation in section 103(1) of the *Wildlife Act*.

2. Do the Director's administrative proceedings or Decision violate the Appellant's right under section 11(b) or (h) or section 7 of the *Charter*?

Section 11

[65] The Appellant argues that subsections 11(b) and (h) of the *Charter* apply to his case. They state:

> 11. Any person charged with an offence has the right
>
> ...
>
> (b) to be tried within a reasonable time;
>
> ...
>
> (h) if finally acquitted of the offence, not to be tried for it again and, if found guilty and punished for the offence, not to be tried or punished for it again;

[66] The Appellant adopts the submission that he made to the Director and criticizes the Decision for not analyzing the section 11 issues. He argued to the Director that section 11(b) should apply since Judge Frame entered a judicial stay based on delay in 2015 (no trial within a reasonable time), and the administrative proceedings were commenced a further two years afterwards. He argued that section 11(h) applied because, while the Appellant was not convicted due to the judicial stay, he should not be subject to retrial and further punishment.

[67] It has long been held that the rights guaranteed by section 11 are available in prosecutions for public offences involving true penal consequences (i.e., criminal and quasi-criminal offences). These rights do not apply in proceedings undertaken

to determine fitness to obtain or maintain a licence, or otherwise impose administrative disqualifications as part of a scheme for regulating an activity in order to protect the public (see *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 [*Wigglesworth*] at para. 23; also*, Blencoe v. British Columbia (Human Rights Commission*), 2000 SCC 44 [*Blencoe*] at para. 88).

[68] The Stay Judgment remedied the breach of the Appellant's right to be tried within a reasonable time under section 11(b) of the *Charter*, as part of the court process: the criminal proceeding was halted and no convictions were entered. I find that section 11(b) protection does not apply to the Director's administrative proceedings.

[69] Similarly, there is no section 11(h) protection that applies to the administrative proceedings because they do not charge and try the Appellant for public offences or sanction him with penal consequences. Accordingly, they do not retry or punish him for the Dall sheep hunt charges.

[70] I find that section 11 does not apply to the Director's administrative proceedings or Decision and that there has been no violation of the Appellant's section 11 *Charter* rights.

Section 7

[71] The Appellant also relies on section 7 of the *Charter*, which guarantees "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." He again adopts the submissions that he made to the Director and criticizes the Decision for not analyzing this issue.

[72] In his submissions to the Director, the Appellant argued that the delay in starting the administrative proceedings, double jeopardy (being punished twice for the same misconduct), and abuse of process should be considered by the Director in order to determine whether his "fundamental justice" rights were properly considered in the BC COS' recommendation for licensing action. He described the administrative proceedings as an attempt to punish him in a manner that may fall within "oppressive or vexatious" proceedings, which are prohibited by the *Charter*.

[73] In his argument to me, the Appellant states that he earns his livelihood as a hunting guide and, as such, he is required to have a hunting licence. He also requires the licence:

- to train his dogs for hunting;
- to carry a firearm into the field for the purposes of protecting his clients; and
- to "have the liberty to accompany his sons who are preparing to be of legal age to hunt" (reply submission, at para. 15).

[74] The Appellant also states that his inability to hold a hunting licence potentially interferes with his ability to feed his family with "legally and ethically" hunted wild meat, which potentially interferes with his life and security (reply submission, at para. 15).

[75] The Director submits that section 7 is not engaged because the Appellant has not established any actual or potential deprivation of section 7 rights from the administrative sanctions that have been ordered.

[76] Unlike section 11, section 7 of the *Charter* is not confined to criminal or equivalent matters; it does apply to administrative proceedings (*Blencoe*, at paras. 45-46).

[77] The Appellant is arguing that his common law grounds of appeal (namely, delay, duplication of proceedings and abuse of process) are also violations of his rights under section 7 of the *Charter*. To do that, he must establish that:

- at least one of the rights to life, liberty or security of the person is at stake;
- the right in question has been violated; and,
- the violation offends the principles of fundamental justice.

[78] It will not be necessary to discuss the second and third bullets because I find that none of the Appellant's rights to life, liberty or security of the person are at stake.

[79] Without question a hunting prohibition does not take, or threaten to take, the Appellant's life; that section 7 right is not engaged.

[80] The liberty interest involves freedom from physical restraint, which is not relevant here because the hunting prohibition is not physical restraint. It also involves the right of individuals to make fundamentally and inherently personal choices affecting their dignity and independence. Medical treatment, reproductive and assisted dying decisions are examples of essential life choices.

[81] The liberty interest, and section 7 as a whole, is not aimed at freedom or security to pursue economic interests. The now well-established weight of authority is that section 7 does not protect a right to a particular livelihood or profession or to participate in a particular economic sector: see *Madadi v. British C*olumbia, 2018 BCSC 1891, at paras. 75-78, citing *Mussani v. College of Physicians and Surgeons of Ontario* (2004), 74 O.R. (3d) 1, at paras. 41-43, and *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, at paras. 45-46.

[82] The Appellant is both a professional guide outfitter and a recreational hunter. He is arguing that the hunting prohibition impacts his freedom to prosper as a professional guide outfitter. I find that his vocation as a guide outfitter is a fundamentally economic interest that is not protected by section 7. The Appellant is also arguing that the hunting prohibition impacts his dietary freedom to feed himself and his family wild meat. I find that this is neither a fundamental personal choice protected by section 7, nor is it protected as an economic choice.

[83] I also find that the Appellant's arguments about the liberty interest are in substance not challenges to the Decision, but challenges to the statutory source of the Director's authority to order hunting prohibitions in section 24 of the *Wildlife Act*. To challenge the constitutional validity of section 24, the Appellant must give notice to the Attorney General under the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, which he did not do.

[84] The security of person interest protects against serious state-caused interference with individual physical and psychological integrity. Examples of this are interference with the therapeutic privacy of the doctor-patient relationship and, again, with reproductive and assisted dying decisions.

[85] *Blencoe* concerned a delay of over 30 months from the initiation of sexual harassment complaints to a human rights commission to the scheduled tribunal hearing of those complaints. The effect was to extend the period of publicity about the allegations and delay the opportunity for Mr. Blencoe to clear his name. Justice Bastarache, speaking for the majority of the Court, held that while it was possible for state-caused delays in human rights proceedings to offend liberty or security of the person under section 7, the delay and its impacts in *Blencoe* were not sufficient and serious enough to do that. The constitutionally protected freedoms in section 7 were not engaged.

[86] The minority of justices in *Blencoe* held that there was no need to examine *Charter* rights at all because undue delay in administrative proceedings should be resolved on administrative law principles, which I examine in the next section of this decision.

[87] In this case, there is no question that the Appellant suffered stress and reputational harm from delay in the Dall sheep hunt prosecution. However, the only striking delay in the Director's administrative proceedings was the year that elapsed between the Appellant's response to notice of the proceedings and the issuance of the Decision, for which there is also a striking scarcity of evidence of actual and significant prejudice to the Appellant. These circumstances are clearly insufficient to engage protected rights under section 7.

[88] I find that there has been no violation of the Appellant's section 7 *Charter* rights.

3. Should the Decision be reversed because of abuse of process from undue delay in the administrative proceedings?

[89] Abuse of process is a common law principle that can be applied to remedy state-caused delay in administrative proceedings that results in a denial of natural justice.

[90] In *Blencoe*, the majority of the Court found that the over 30-month delay in the administrative process also did not amount to an abuse of process justifying a halt of the proceedings. Justice Bastarache made key rulings about establishing abuse of process from undue delay in administrative proceedings, which have been applied in subsequent decisions of the Board and courts:

- Delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period.
- In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay. That prejudice can take two forms.

- The first form of prejudice involves proceedings that are unfair because delay impairs a party's ability to answer a complaint; for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost.
- The second form of prejudice involves psychological harm or stigma attaching to a person's reputation. The delay must be inordinate, which must be determined contextually and not on the basis of the length of the delay alone. The prejudice must be directly caused by the delay in the administrative proceedings and not by underlying events giving rise to those proceedings. The delay must cause actual prejudice of such magnitude that the public's sense of decency and fairness is affected.
- An applicant for a stay of administrative proceedings for abuse of process will bear a heavy burden. A stay should only be granted in the clearest of cases, which will be extremely rare.

[91] In the appeal before me, both parties cite the Board's decision in *Loring v. Deputy Director of Wildlife* (Decision No. 2005-WIL-008(a), November 29, 2005) [*Loring*], which concerned a four-year delay in imposing administrative sanctions after Mr. Loring was convicted of many hunting, waste management and fisheries offences. The Board discussed *Blencoe*, noting that excessive delay in administrative processes may constitute an abuse of process; however, proof of significant prejudice to the fairness of the process or the individual is required. Although there was inordinate delay, no remedy was ordered by the Board because there was no evidence that the delay had caused prejudice to Mr. Loring.

[92] The Director also cites *Schreiber v. Minister of Environment*, 2001 BCSC 515, a judicial review of a Board decision. Mr. Schreiber had requested and received a delay of administrative action pending his appeal of convictions for three hunting offences to the court. His appeal succeeded and a new trial was ordered on which the Crown decided not to proceed. Administrative sanctions were imposed 14 months later. Applying *Blencoe*, the Court upheld the Board's finding that no unreasonable delay had been established because at least part of the delay of administrative action was at Mr. Schreiber's request, and he had provided no proof of prejudice from the delay.

[93] *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727, leave to appeal refused, [2012] S.C.C.A. No. 549, is also notable. In that case, a physician faced professional discipline proceedings after the stay of criminal charges against him for alleged sexual abuse of children between 1970 and 1991. A complainant had first come forward to police in 1991. Criminal charges were laid in 1998 and 1999 after two more complainants had come forward. The Crown stayed the charges relating to the first complainant on the basis of an undertaking from the physician. In 2004, it stayed the charges relating to the second complainant pending the outcome of challenges to the charges relating to the third complainant, which were ultimately stayed in 2006 for unreasonable delay under section 11(b) of the *Charter*.

[94] After becoming aware of allegations against the physician in 1999, the College of Physicians and Surgeons had monitored the criminal cases until 2004 when it began its own investigation. Notice of a discipline hearing was issued in 2006. It concluded with a decision in 2009. Applying *Blencoe*, the College discipline committee refused to stay its discipline proceedings for abuse of process from inordinate delay. The Courts upheld the discipline committee's conclusions that:

- it would have been impractical and unfair to pursue discipline proceedings until after the criminal cases concluded;
- the passage of time before and after the conclusion of the criminal cases was not inordinate;
- there was no significant prejudice to the physician because the College's interim restrictions on his ability to treat children had not suspended or significantly affected his practice;
- the primary cause of any stress or stigma he experienced was the criminal and not the disciplinary proceedings; and
- there had been no significant loss of evidence.

[95] The Appellant relies on the findings of delay and prejudice in the Stay Judgment and has provided his affidavit and other materials that he filed with the court in support of his section 11(b) *Charter* application in the Dall sheep hunt trial. Although he also asserts delay in the administrative proceedings after his appeal of the Merits Judgment was dismissed, the evidence relates almost exclusively to the Dall sheep hunt charges. Paragraph 29 of the Appellant's Affidavit (July 23, 2019) attests that the "effects of the Dall sheep hunt charges on my family and me have only compounded". These are effects of the offence proceedings, not the administrative proceedings; how they have compounded is not described. Paragraph 30 refers to past bullying of the Appellant's child and threats to the Appellant and his family when the Dall sheep hunt trial was underway. These matters, and the exhibits relating to them, date from the publicity around to the Dall sheep hunt charges; they are not prejudice related to delay in the administrative proceedings.

[96] The Decision addressed the Appellant's delay arguments in a limited way. It found that the Director first became aware of the facts of the Dall sheep hunt when Mr. Winegarden gave notice of the administrative proceedings on July 31, 2017. It explained that the Decision was reserved for a year after the Appellant provided his response because of challenges in reassigning the matter to another decision-maker after Mr. Winegarden left his position in January 2018.

[97] The proposition that the Director only became aware of the facts of the Dall sheep hunt on July 31, 2017 is not tenable. I agree with the Appellant on this point and the Director has not attempted to defend this proposition on the appeal. However, I find that it was reasonable, and probably advantageous to the Appellant, that the administrative proceedings were not started until the Dall sheep hunt trial and appeals concluded, and that he suffered no administrative impacts during that period because the Director imposed no interim sanctions.

[98] The Appellant has not been under sanctions while the administrative proceedings and appeal have unfolded either. The penalty ordered in the Decision was not effective until January 1, 2019 and, once appealed to the Board in November of 2018, it was voluntarily stayed pending the outcome of this appeal.

[99] The Appellant has not provided evidence of publicity or harm to his reputation from the administrative proceedings. There is no indication they have received public attention or interest. There was no unfairness to the him while the Decision was pending because he was aware of the matters in the Recommendations Package and had already responded to the notice of the administrative proceedings. The Appellant has not established any other form of prejudice due to delay in the administrative proceedings.

[100] I find that the Appellant has not established actual and significant prejudice from delay on the administrative process. The Decision should not be reversed for abuse of process caused by undue delay in the administrative proceedings.

4. Should the Decision be reversed because of misconduct and abuse of process by BC COS and licensing officials?

[101] The Decision held that the Appellant's allegations that the BC COS had taken "prejudicial and discriminatory" actions against him were irrelevant because the Director's role was limited to determining whether violations had occurred, and the appropriate penalty to assess for any violations. I find this was an error.

[102] The Director's role under section 24(2) to determine if there is "any cause sufficient" for administrative sanction does not permit the disregard of relevant factors and evidence. Misconduct by BC COS and licensing officials that is proven, and constitutes abuse of process in the administrative proceedings, would be such a factor. The Director cannot simply disregard the Appellant's evidence and arguments on that issue.

[103] The Appellant's allegations under this heading rest on findings he says Judge Frame made when she decided that the Appellant's right to trial within a reasonable time had been violated.

[104] It is true that the Stay Judgment considered the Appellant's suspicions that the outstanding charges had caused BC COS and licensing officials to deny him an assistant guide licence in June 2013, and to target hunters on the December 2013 cougar hunt guided by the Appellant. The Appellant says that the Decision should be reversed because, in paragraphs 62-67 of the Stay Judgment, Judge Frame found that misconduct and abuse of process by the provincial officials in fact occurred.

[105] I do not agree with the Appellant's characterization of the findings in the Stay Judgment.

[106] The first part of paragraph 62 addressed conservation officers involved in the prosecution inadvertently misrepresenting the charges to business associates of the Appellant. They were Environment Canada investigators, not BC COS officers. The second part of paragraph 62 addressed the Appellant's suspicions about the conduct of BC COS officers respecting the cougar hunt:

> … Added to that was the issue of the cougar hunt investigated by conservation officers in British Columbia. Mr. Dougan believed they were only investigating the hunt because he was the assistant guide. This suspicion arose from a valid concern. He alleges that a comment had been made to other hunters in that party that they would be investigated so long as they were associated with Mr. Dougan.

[107] Paragraph 63 described the prosecution's arguments that how the Appellant had been treated, or believed he had been treated, by conservation officers was not relevant to unreasonable delay in prosecuting the Dall sheep hunt charges.

[108] Paragraphs 64 to 66 canvassed whether provincial officials had improperly targeted the Appellant over his application for an assistant guide outfitter licence and the cougar hunt. Judge Frame described the Appellant's suspicions and expressed significant concern about whether there was improper targeting of the Appellant. She referred to "inaccurate foundations for the licensing decision and the misstatements" made to the Appellant's clients, compounding the prejudice he suffered from delay of the offence charges (para. 64). However, she found that the Appellant's allegations were disputed and that, on the evidence before her, she could not conclude that there was an abuse of process. She found that, whether overzealousness of provincial officials transpired for a proper or improper purpose, it was because of the period of uncertainty created by the overlong offence proceedings that the Appellant's suspicions compounded his stress over the offence charges.

[109] Judge Frame did not determine the disputed allegations of improper targeting or find an abuse of process.

[110] In paragraph 67, Judge Frame also put perspective on the impact of the Appellant's suspicions about being targeted by conservation officers, finding that they, "contributed to the vexations of [the Dall sheep hunt] proceeding and the prejudice to him, but were not as significant a factor as the extraordinary media coverage nor [sic] the reluctance of some outfitters to use Mr. Dougan while these charges are outstanding."

[111] I conclude that the Stay Judgment did not decide, or turn on, the merits of the Appellant's allegations of misconduct by provincial officials. Rather, it found that the merits of the Appellant's suspicions were disputed and that abuse of process was not proven.

[112] Turning to the record before me on this appeal, the evidence about the assistant guide outfitter licence and the cougar hunt is found in the Appellant's affidavit (January 20, 2015). Most of that affidavit is about the impact of publicity from the Dall sheep hunt charges. However, in paragraph 25, the Appellant attested to his difficulty obtaining an assistant guide outfitter licence because of the outstanding charges. He described this as "illustrative of the attitude of hostility toward me with the Ministry and their willingness to use false, unproven and anonymous reasons to deny me any licenses."

[113] Documentation in Exhibit "E" of the affidavit shows that the Appellant applied for the assistant guide outfitter licence in March 2013. On June 19, 2013, the Regional Manager denied the licence stating that:

> In processing your application, it came to our attention that you have received both warnings and tickets for violations of the *Wildlife Act*.
>
> I have reviewed and discussed your application with the relevant Conservation Officers, and have determined that for the moment, these violations are sufficient to deny your licence.

[114] The Appellant appealed the licence refusal to the Board and applied for a stay pending the Board's decision on the appeal. In July 2013, the appeal was allowed by consent order of the Board. The consent order indicated that the Ministry had denied the licence without first hearing from the Appellant. It directed that a licence be issued to the Appellant, without prejudice to later action after a hearing under section 61 of the *Wildlife Act*.

[115] Paragraph 25 of the Appellant's affidavit also attested that he never received any disclosure of the discussion between the Regional Manager and conservation officers mentioned in the Regional Manager's refusal letter, "although I suspect it was similar to that discussed with Mr. Giles and as outlined in his affidavit and Mr. Schlukebir in Exhibit "D" to this my affidavit."

[116] Mr. Giles's affidavit is not in the appeal record. The Appellant had an opportunity to include it as part of his case but chose not to do so. The letter from Mr. Schlukebir, a client of the Appellant, is in the appeal record and discussed below.

[117] Paragraph 25 of the Appellant's affidavit continued, attesting to his stress from uncertainty about obtaining the assistant guide outfitter licence, expense for legal advice, and expense ($5,000) for hiring another assistant guide if he could not honour his guiding commitments for the remainder of the 2013/14 season. Whether the latter expense actually came to pass is not clear. The Appellant's undated letter to Mr. Winegarden (attached to his counsel's October 31, 2017 submission) simply states that he experienced income reduction due to declining work during the period of uncertainty around his assistant guide outfitter licence.

[118] Evidence about the cougar hunt is in paragraph 17 of the Appellant's affidavit (January 20, 2015) and Exhibit "D" to that affidavit, which is an unsworn letter from Mr. Schlukebir dated January 27, 2014. In paragraph 17, the Appellant attested that he and Mr. Giles were hunting for cougar with clients in December 2013 when BC COS officers attended where the group had parked their trucks and one of the hunters was waiting. The Appellant stated his belief that the BC COS officers were there to target him after the Dall sheep hunt trial had not completed earlier that month. He stated that, upon his and Mr. Giles's return to the vehicles, "it was made clear" to them that "as long as he was associated with me, he would become under increased scrutiny" by the BC COS. Mr. Schlukebir's letter claimed that the BC COS officers searched the hunters' belongings without reason, and stated his belief that they delayed the hunters with questioning in order to interfere with the hunt by pushing it past the end of legal shooting time.

[119] In the Appellant's undated submission to Mr. Winegarden, he claims that "[m]embers of COS threatened fellow outfitters not to work with me or they would be persecuted. This is a sensitive subject as people are afraid of them as their

livelihood depends on this" and "COS directly contacted and made false statements to some clients and booking agents directly affecting my business."

[120] I find that the Director was wrong not to consider the Appellant's allegations against the BC COS and licensing officials. When the evidence is considered, however, it amounts to the Appellant's assertions that are inadequately supported by evidence, the unsworn suspicions of one of his clients, and reference to vague hearsay allegations. This is not sufficient to prove the alleged misconduct.

[121] Only if the alleged misconduct was proven would I consider whether it constituted abuse of process relative to the Director's administrative proceedings.

[122] I am unable to find a basis to substantiate this ground of appeal.

5. Should the Decision be reversed because the administrative proceedings duplicate prior court proceedings?

[123] The Appellant argues that the administrative proceedings are a "blatant exercise in ensuring [the Appellant] is punished for perceived misdeeds when the investigators [and] Conservation Officer Service were not satisfied with what occurred during the [Dall sheep hunt] trial process" (statement of points, at para. 33). He relies on issue estoppel and abuse of process to bar the administrative proceedings, arguing that they duplicate the Stay Judgment that concluded the Dall sheep hunt prosecution.

[124] The common law doctrine of *res judicata* prevents relitigation of the same matter (cause of action estoppel) or the same issues (issue estoppel). Abuse of process may bar duplicative litigation when the formal requirements of *res judicata* are not met. I will consider each of these principles.

(a) Cause of action estoppel

[125] The Director submits that the prosecution of offences is not the same matter as administrative action. I agree that cause of action estoppel does not apply as a bar between different types of proceedings, such as criminal and administrative proceedings, even when the same facts and conduct are involved, because those proceedings are distinct in nature from one another: *Wigglesworth*, at paras. 27-28. Cause of action estoppel does not apply here.

(b) Issue estoppel

[126] Issue estoppel can apply across different types of proceedings if three preconditions are met:

(a) the issue must be the same as the one decided in the prior decision;

(b) the prior decision must be final;

(c) the parties to both proceedings must be the same or their privies (meaning the same in law).

[127] Even if these preconditions are met, there is discretion whether to apply issue estoppel: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 [*Toronto (City)*], at para. 23, and *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 [*Danyluk*], at para. 25.

[128] I find that precondition (b) for issue estoppel is met because the Stay Judgment conclusively determined the Dall sheep hunt charges.

[129] Precondition (a), identity of issues, refers to "the material facts and the conclusions of mixed fact and law (the 'questions') that were necessarily (even if not explicitly) determined in the earlier proceedings": *Danyluk,* at para. 24.

[131] The Stay Judgment determined that there was infringement of the Appellant's right to a trial within a reasonable time under section 11(b) of the *Charter*. This was not an issue in the administrative proceedings, nor could it be for the reasons I gave in Issue 2. The Stay Judgment found the Appellant was stressed by his suspicions that the outstanding Dall sheep hunt charges had caused provincial officials to improperly deny the assistant guide outfitter licence and target the cougar hunt, but it did not determine the disputed merits of those suspicions or find that abuse of process was proven. I find precondition (a) for issue estoppel, identity of issues, is not met.

[130] Since all three preconditions must be met, issue estoppel does not apply between the Stay Judgment and the administrative proceedings. I will nonetheless consider precondition (c), the requirement of mutuality of parties, because of the emphasis the parties have given to it.

[131] The Appellant cites *British Columbia (Director of Civil Forfeiture) v. Hyland*, 2009 BCSC 1906, where the Court concluded that a provincial Crown prosecutor and the provincial Director of Civil Forfeiture were the same party because the Crown is "indivisible". The Director replies that this decision was overturned in *British Columbia (Director of Civil Forfeiture) v. Hyland*, 2010 BCCA 148. The Court of Appeal held that issue estoppel did not apply because precondition (a), identity of issues, was not met (a conclusion I have also reached in this case). Newbury J.A., speaking for the Court, went on to state that, although precondition (c) did not have to be decided, she was not persuaded of the proposition that it was met because the Crown was "indivisible".

[132] The Director also points out that the prosecutor of the Dall sheep hunt charges and the Director of Wildlife are even more separate than the government officials in *Hyland* because in the latter both were provincial officials, whereas the Dall sheep hunt charges were prosecuted by the federal Crown and the Director of Wildlife is a provincial official.

[133] I agree with the Director. I find that precondition (c), the requirement for mutuality of parties, is also not met.

[134] I find that issue estoppel does not apply between the Stay Judgment and the administrative proceedings.

(c) Abuse of process

[135] Where formal requirements of *res judicata* are not met, the doctrine of abuse of process may still prevent re-litigation if permitting later proceedings would violate principles of judicial economy, consistency, finality and integrity of the administration of justice: *Toronto (City)*, at para. 37.

[136] The substance of the Appellant's argument is that it is an abuse of process for the Director to substitute her decision for the Stay Judgment. The simple answer to this contention is that it is settled law that criminal charges and licensing or disciplinary proceedings can be brought in respect of the same conduct, and evidence of prior criminal or civil proceedings is admissible in civil actions and administrative and disciplinary proceedings, with the weight and significance to be given to them varying with the circumstances of each case: *R. v. Malik*, 2011 SCC 18, at paras. 40-43, 46-48; *Toronto (City)*; *Danyluk.*

[137] In this case, the Director's administrative proceedings are not a prosecution of offences and do not challenge the validity of, or relitigate, the findings of the courts in the Stay Judgment or Merits Judgment. The *Wildlife Act* also expressly authorizes the administrative proceedings, in addition to any offence proceedings.

[138] I find there is no footing from which to conclude that the administrative proceedings are an abuse of process because they duplicate prior court proceedings.

6. Can the Appellant deny or relitigate the criminal court judgments against him?

[139] This question addresses another form of abuse of process by relitigation: the bar preventing an offender from denying the validity or substance of their conviction in a later proceeding involving a different cause of action and different opposing party than the Crown prosecutor of the criminal charges.

[140] That is what happened in *Toronto (City)*, where an employee grieved his dismissal after having been convicted of sexual offences against children in his care. In the criminal proceedings, the employee pled not guilty, testified, was disbelieved and unsuccessfully appealed his conviction. The Court held that the convictions were conclusive and the relitigation of their correctness in the grievance proceedings was a blatant and impermissible abuse of process.

[141] The bar created by this form of abuse of process is rooted in logic, efficiency and public policy. The weight to be given to a prior judgment in a subsequent proceeding depends on such factors as the similarity of the issues to be decided, the identity of the parties, and (because of the differing burdens of proof) whether the prior proceedings were criminal or civil: *R. v. Malik*, at para. 40. A prior criminal judgment is less capable of being rebutted, and challenging it is much more likely to constitute an abuse of process.

[142] The Appellant was represented by counsel for the Yukon charges, the convictions were obtained on guilty pleas and agreed sentencing submissions, the sentencing judgment states that the Appellant expressed remorse through his

counsel. There was no need for the Director to find that the Yukon charges were proven, and the convictions were correct; nor would it have been proper to relitigate those allegations in the administrative proceedings. The Director's role was to determine the significance and weight to be given to the convictions for the administrative proceedings.

[143] The Appellant's Affidavit and submissions on the appeal before me do not deny the fact of the Yukon convictions. They do, however, challenge the sentencing judge's determination of the circumstances of the wastage of meat offence and they insinuate that the Appellant was not, in fact, guilty of hunting within six hours of flying, and that he only pled guilty to resolve the matter. The effect is a rewriting and minimization of the offences that is inconsistent with the convictions and sentencing judgment. I am disregarding this part of his evidence and submissions as an impermissible abuse of process by relitigation.

[144] Turning to the judgments on the Dall sheep hunt charges, the Appellant stresses his right to plead not guilty and defend those charges, the fact that he was not convicted, and the inability of the Director to convict him and substitute her decision for the Court's Stay Judgment.

[145] I have already explained that the Director has not convicted the Appellant of offences or substituted her decision for the Court's judgments. What I will emphasize here is that there was no need for the Director to find the Appellant guilty of the Dall sheep hunt charges. It is also unnecessary to give weight to factual narratives in the Environment Canada investigator's report to Crown counsel or the BC COS's recommendations to the Director. This is because those charges were proven beyond a reasonable doubt in the Merits Judgment, after a trial in which the Appellant pled not guilty, testified, and was not believed.

[146] The Director's consideration of the Court's guilty verdict did not undermine the Appellant's rights to plead not guilty, defend the criminal charges and require the Crown to prove them beyond a reasonable doubt. Those were his rights and he exercised them. After he was found guilty beyond reasonable doubt, the Director could accept the Court's findings of his guilt: the doctrine of abuse of process prevents the Appellant from denying or relitigating the fact or substance of those findings.

7. What is an appropriate penalty in the circumstances?

[147] The Appellant submits that the Director erred by:

- misconstruing terminology and facts respecting the Appellant's criminal and administrative record;
- concluding the Appellant had been convicted of offences respecting the Dall sheep hunt, when he was not;
- putting adverse weight on his unproven COORS record when he has not been convicted of any British Columbia wildlife offences;
- stating that she would not rely on the Appellant's Yukon convictions and COORS record and then, in fact, doing so;

- being inconsistent and unclear about how the Yukon convictions factored into the determination of penalty;
- concluding, without evidence, that the Appellant likely profited in stature as a hunter, and economically as a result of harvesting the trophy Dall sheep; and
- giving insufficient weight to the consequences the Appellant already suffered from the Dall sheep hunt prosecution.

[148] I will examine these alleged errors and make my own assessment of the appropriate sanctions based upon the sufficiency of the evidence.

[149] I agree that the Decision contains uneven and sometimes inaccurate terminology around the Appellant's criminal and administrative record. An example is the use of "offence" or "offender" in reference to, or inclusive of, non-offence proceedings. On the whole, however, the Director recognized the differing nature of prosecution and conviction for an offence versus administrative action. There is no error in her conclusion that "violation" may be used in reference to offence convictions as well as findings of guilt without conviction, including in administrative proceedings (pp. 5-6). I find that the Director understood that the burden of proof is higher for criminal proceedings than it is for administrative proceedings (pp. 4, 7). She also understood that administrative actions may occur on the basis of a conviction for an offence, for conduct that was not prosecuted as an offence, or for conduct that was prosecuted and did not result in conviction (pp. 6-7).

[150] I find the Decision does not conclude that the Appellant was convicted of offences respecting the Dall sheep hunt, when he was not. It accurately states that:

- … Mr. Dougan was found guilty of four offences in December 2014. However, following *Charter* applications, all charges were stayed due to the Judge's ruling that inordinate and unjustifiable delays of the trial has [sic] caused an infringement of Mr. Dougan's *Charter* rights. As a result, no convictions were recorded.
- Mr. Dougan's appeal to have the guilty findings expunged was later dismissed by the Judge, thus while he was not convicted of the four offences, he was nonetheless found guilty of them in a Court of Law. (p. 4)

[151] This recognition is also evident elsewhere in the Decision (see pp. 3, 5).

[152] The Appellant takes issue with the correctness of the following passage in the Decision:

> … The Director reviews any court case material provided and cannot change a court's decision but can come to a different conclusion for purposes of section 24 action as the burden of proof for administrative law is much lower than for criminal law. In this case, I see nothing improper with the Director considering the court offences for which Mr. Dougan was charged and found guilty, but not convicted of due to a Charter finding of prejudice due to the length of the trial. (p. 7)

[153] The first sentence in the above passage is correct; an acquittal of criminal charges does not preclude a different result being reached on the balance of probabilities in civil or administrative proceedings respecting the same conduct. I find that the second sentence is also correct for the reasons already provided.

[154] The Appellant submits that the Decision says one thing on page 6 and then does another in the Reasons for Penalty on page 8. Page 6 correctly states that a history of violations "has bearing on the type and length of penalty applied" and then agrees with the Appellant:

> … that Mr. Dougan has been sufficiently penalized for his actions in the Yukon and that none of the "rap sheet" items resulted in guilty findings or convictions, so I will not apply additional penalties for any of those actions. (p. 6)

[155] The Appellant says that the conclusion of the Reasons for Penalty contradicts the above statement by giving weight to the Yukon convictions and COORS printout:

> I believe that the totality and seriousness of Mr. Dougan's offences warrant consideration of a 4 to 7-year hunting suspension. However, taking into account all of the above, that this is the first time he has been recommended to the Director for licence action in British Columbia, and the importance of hunting to him and his family, I have decided to limit his suspension to two years. (p. 8)

[156] The Director submits that the Yukon convictions and Dall sheep hunt guilty verdicts were of most significance to her Decision and the COORS printout was less so (Director's Affidavit, at paras. 40-42). She states that she considered the Appellant's "other offences described in COORS" and then gave weight to the mitigating factor that "[n]one of the 10 alleged other British Columbia violations described in COORS resulted in convictions or findings of guilt" (Director's Affidavit, at paras. 51(f) and 52(b)).

[157] The Director further explains that she considered the Yukon convictions to be a relevant factor, and then gave weight to the mitigating fact that the Appellant had already been penalized for those offences. She is critical of the Appellant's lack of remorse and minimization of the seriousness of the Yukon offences (Director's Affidavit, at paras. 47-51(e), 52(a), 53; statement of points, at paras. 43-45). Paragraph 56 of her Affidavit explains that:

> … I, as part of my assessment of whether or not to take section 24 administrative action, considered the convictions entered against Mr. Dougan in the Yukon for his *Wildlife Act* offences. When I stated they would not be taken into account in my decision with respect to "additional penalties" … I was articulating that the specific number of months or years of his licence suspension was not directly impacted by the Yukon convictions.

[158] Paragraph 57 then attests that:

> … the causes which I considered sufficient for the section 24 suspension were the Yukon convictions and the British Columbia judicial findings of guilt regarding the 1999 Dall Sheep incident.

[159] In my view, the logical sense of the statement at page 6 of the Decision is that the Yukon convictions and COORS printout would not result in administrative sanctions additional to those imposed respecting the Dall sheep hunt. This is also consistent with the fact that the Reasons for Penalty arrived at a potential penalty range of up to 10 years by reference to only the Dahl sheep hunt violations (pp. 7-8) and reiterated that the Director "considered that Mr. Dougan has already been penalised [sic] for his Yukon offences" (p. 8).

[160] I am unable to reconcile the noted parts of pages 6 to 8 of the Decision, or the Director's explanations on this appeal, with the conclusion of the Reasons for Penalty on page 8.

[161] The Director's submission characterizing the entries in the COORS printout as "offences", when they are not, and then acknowledging that they did not result in convictions or findings of guilt, only clouds whether and what weight the COORS printout was given in determining the two-year penalty. Given the limited significance of that evidence in this case, I am giving the COORS printout no weight in my assessment of sanctions.

[162] The Director's submission about the Yukon convictions makes clear that she considers them a relevant factor. In my view, they are highly relevant because they are serious and indicate the Dall sheep hunt violations were not an isolated incident early in the Appellant's career. I have disregarded the Appellant's evidence and submissions that minimize the Yukon convictions, because they are an abuse of process. I agree though that the length and impact of the 20-year Yukon hunting prohibition is a consideration in favour of a lower length of sanction for that conduct under section 24 of the *Wildlife Act*.

[163] The Appellant's submissions respecting penalty for the Dall sheep hunt violations revolve around the evidence, endorsed in the Stay Judgment, of significant personal and financial harm to him and his family due to publicity surrounding the unduly long prosecution of those charges. I agree that those hardships are considerations in favour of a lower length of sanction for that conduct under section 24 of the *Wildlife Act*. A hunting prohibition will also be acutely felt by the Appellant as a professional guide, and provider of wild meat for his family's consumption. That is also a consideration.

[164] On the other hand, as a professional guide outfitter, the Appellant was well acquainted with hunting regulations and ethical standards and, on this appeal, he has expressed only qualified remorse about the Yukon convictions and really none about the Dall sheep hunt violations. In my view, both general and specific deterrence, and the fact that the Appellant has suffered no sanctions for the Dall sheep hunt violations, support the necessity of administrative sanctions that are of consequence to him, and in the eyes of the hunting community.

[165] I disagree with the Appellant that there was no evidence for the Director to conclude that he likely benefited from the illegal harvest of the Dall sheep. The Appellant's evidence describes a highly active and successful guide outfitter before

the publicity from the 2012 Dall sheep hunt charges. Since that hunt happened in 1999, and the Appellant publicized his record for the second largest Dall sheep taken in British Columbia in 2002, it is reasonable to infer that this impressive feat attracted customers to his business.

[166] Although the Dall sheep hunt happened many years ago, Judge Frame's finding that the Appellant hid his misconduct from provincial officials by falsely reporting the kill site is a serious matter and is highly unethical. Furthermore, it was the Appellant's own false report that allowed him to benefit during the years before his misconduct was discovered and he was charged.

[167] Based on a review of administrative and automatic sanctions under section 24 for previous cases involving violations similar to the Dall sheep hunt, the Director concluded that up to a 10-year hunting prohibition could be warranted, though she noted that "the WAPPRITA violations could be considered duplicative" (p. 8). I have reviewed the two WAPPRITA charges and they are not duplicative; one is for transporting the sheep out of Yukon without a permit to do so, the other is for transporting the sheep from Yukon to British Columbia when it was harvested without a permit in Yukon. That said, a zero to 10-year range reflects such a variety of circumstances that it is not too helpful for case-specific guidance.

[168] Several Board decisions cited by the Director are of some assistance in assessing penalty. In *Klapper v. Deputy Director of Wildlife* (Decision No. 2006-WIL-003(a), June 11, 2007), the Board reduced an 11-year hunting prohibition to six years against Mr. Klapper, after he had pled guilty to six hunting-related offences committed under serious circumstances that included dangerous handling of firearms, for which he had been sentenced to a $30,000 fine, forfeiture of his hunting equipment and firearms, and a four-month conditional sentence. The Board reduced the penalty after taking into account mitigating circumstances that included remorse, unacceptable delay in the deputy director making the administrative decision, and extreme personal and financial consequences of the offence proceedings.

[169] In *Klapper*, twenty months passed between the criminal convictions and notice of the administrative proceedings. Mr. Klapper responded within two months of receiving that notice, and then almost three years passed before the deputy director issued a decision. Mr. Klapper did not ask for a halt of the administrative proceedings because of the delay but did ask for a penalty reduction. The Board held that he had suffered some, though not significant, prejudice from the delay but its length was significant enough to be taken into account in determining the length of penalty.

[170] The personal consequences that the Board took into account included the arrival of the Klappers' young granddaughter at their home after school when they were not there, and a search warrant was being executed. This led to the calling of social services, the temporary apprehension of their granddaughter, and stress on Mrs. Klapper that nearly ended their marriage. The financial consequences from the convictions included the loss of Mr. Klapper's franchise business.

[171] In *Steele v. Deputy Director of Wildlife* (Decision No. 2011-WIL-011(a), October 26, 2012), the Crown stayed multiple hunting offence charges against Mr.

Steele relating to a 2005 hunt. The same matters were then considered in detail in administrative proceedings under section 24. Over two years passed between the stay of the criminal charges and notice of the administrative proceedings. Mr. Steele responded to that notice within two months, and then 18 months passed before the deputy director's decision was issued. The deputy director found that Mr. Steele had committed eight contraventions. He concluded that the seriousness of the conduct warranted a five- to six-year hunting suspension; however, after considering other factors, including the delay in issuing his decision, the deputy director issued a three-year hunting prohibition.

[172] On appeal, Mr. Steele sought a halt to the administrative proceedings and reversal of the decision because the events had happened so long ago. The deputy director asked for the penalty to be increased to six years because of Mr. Steele's "attitude" (para. 134). The Board confirmed the three-year hunting prohibition. Applying the *Blencoe* test, it found that Mr. Steele had proven no prejudice from delay, and therefore no abuse of process. The Board nonetheless endorsed the consideration of delay in issuing the deputy director's decision as a factor in determining the length of penalty (para. 136).

[173] In *Neal v. Deputy Director of Wildlife* (Decision 2005-WIL-012(a), October 6, 2005), the deputy director issued a seven-year hunting prohibition against Mr. Neale after he was convicted of 10 hunting offences, sentenced to 45 days imprisonment, fined $20,000, and described by the Court as a repetitive and incorrigible poacher. The Board varied the prohibition to five-years and 11-months, by consent.

[174] In *Johnston v. Deputy Director of Wildlife* (Appeal No. 95/45, September 4, 1996), the Board upheld a 10-year hunting prohibition against Mr. Johnston after his conviction of five hunting offences. His actions were described as premeditated, extremely unethical and took place over a two-year period.

[175] In *Rema v. Deputy Director of Wildlife* (Decision No. 99-WIL-01, October 18, 1999), the Board reduced Mr. Rema's three-year hunting prohibition to two years. Mr. Rema had been convicted of one offence of discharging a firearm from a vehicle after consuming alcohol and in the presence of young persons.

[176] *Pitt v. Deputy Director of Wildlife* (Decision No 2016-WIL-004(a), October 28, 2016) is an unusual case in that, when Mr. Pitt appealed a two-year hunting prohibition for incidents arising out of verbal and written warnings and ticket violations, the Board decided that the penalty was too lenient and imposed a four-year hunting prohibition.

[177] On reviewing these cases, it quickly becomes apparent that sanctions are influenced by a wide variety of factors, and as a result vary on a case-by-case basis. Further, the two-year hunting prohibition ordered in the Decision is, by no means, at the high end of the spectrum for the seriousness of the Appellant's violations.

[178] It also becomes apparent that inordinate delay in administrative process that does not result in prejudice amounting to an abuse of process, can be addressed, in appropriate cases, by remedies other than halting the proceedings, such as by reducing the length of penalty.

[179] In my view, the duration of the sanctions ordered by the Director is at the lowest end of the scale for this case. A longer period could reasonably have been ordered. However, taking into account the 20-year hunting prohibition the Appellant is serving for the Yukon convictions and the impact of publicity during the prolonged trial of the Dall sheep hunt charges, I have decided to confirm the two-year penalty.

[180] In reaching this conclusion, I have considered that the Board has authority to order an increased penalty, but the Director has not sought one.

[181] I have also considered that, although the Appellant suffered no tangible prejudice from the year that passed between his response to the notice of administrative proceedings and the issuance of the Decision on October 23, 2018, that time period was excessive, especially in the context of Mr. Winegarden's reluctance to extend the Appellant's time to respond: there was a timeline on the Appellant's opportunity to respond, but apparently not on the generation of a decision. This observation is not a reflection on the Director as a decision-maker; I accept that she was not assigned this matter until July 31, 2018, which was nine months after the Appellant responded to the notice of administrative proceedings.

[182] In confirming a penalty at the low end of the scale, I have also taken into account balancing the public interest in the effective regulation of hunting activity against the proportionality of resources and desirability of finality, for the administrative process and the parties. The time has come for the Appellant to serve the two-year penalty ordered by the Director under section 24 of the *Wildlife Act* for these very serious incidents.

DECISION AND ORDER

[183] In making this decision, I have fully considered all of the evidence and submissions made, whether or not specifically referred to in this decision.

[184] Based upon my findings, I order pursuant to section 101.1(5)(b) of the *Wildlife Act* that the Decision under appeal is confirmed, and will take effect on February 1, 2020, or such other date as the Appellant may request and the Director, in her discretion, allow.

[185] The appeal is dismissed.

"Susan E. Ross"

Susan E. Ross, Panel Chair
Environmental Appeal Board

December 23, 2019