# IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Heynen v. YTG*, 2007 YKSC 49

Date: 20070706
Docket: S.C. No. 06-A0003
Registry: Whitehorse

BETWEEN:

**KLAAS HEYNEN and**
**KUSAWA OUTFITTERS LTD.**

**Plaintiffs**

AND:

**GOVERNMENT OF THE YUKON TERRITORY and**
**THE HONOURABLE DALE EFTODA,**
**(FORMER) MINISTER OF RENEWABLE RESOURCES**

**Defendants**

Before: Mr. Justice H. Groberman

**REASONS FOR JUDGMENT**
**DELIVERED FROM THE BENCH**

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|---|---|
| Counsel for the Plaintiffs | Terrence Robertson, Q.C.<br>Sean Taylor |
| Counsel for the Defendants | Penelope Gawn<br>Stephanie Schorr |
| Date and Place of Hearing: | July 4-6, 2007<br>Whitehorse |

[1] GROBERMAN J. (Oral): In this judicial review proceeding, Mr. Heynen seeks an order quashing the March 27, 2002 decision of the Minister of Renewable Resources

revoking his outfitting concession. Mr. Heynen alleges three separate grounds for quashing the decision:

1. That the Minister took into account irrelevant considerations, and failed to take into account required considerations in reaching his decision;
2. That the Minister failed to observe the requirements of procedural fairness in coming to his decisions and indeed that there is evidence supporting a reasonably apprehension bias with respect to the decision; and
3. That the revocation of the outfitting concession was so disproportionate to the infractions committed by Mr. Heynen as to be patently unreasonable.

[2] The defendant Minister takes issue with each of these grounds of review, and argues, as well, that even if one or more of these grounds is made out, relief ought to be denied on the basis of the excessive delay by Mr. Heynen in bringing this judicial review application before the Court.

**Factual Background**

[3] In the Yukon, non-resident hunters are prohibited from hunting unless they are accompanied by a guide. Areas of the Territory are designated as "Outfitting Concessions". In each outfitting concession, a guide outfitter has the exclusive right to supply guides to non-resident hunters hunting big game. Subject to certain limitations, these concessions may be renewed indefinitely and are transferable. They are, accordingly, valuable property.

[4] Mr. Heynen, at first personally, then in conjunction with his wholly controlled corporation, Kusawa Outfitters Ltd., held an outfitting concession, known as Outfitting

Concession 17, from 1967 to 1998. The concession is located in the southwest of the Yukon, in the vicinity of Whitehorse.

[5] Mr. Heynen's record and reputation as a guide outfitter appears to be a matter of some debate. At the least, it can be said that there are both good and bad things that are said of him. On the one hand, he appears to have operated a successful guide outfitting business, and has been described as both as a humanitarian and as a conservationist. On the other, he was, up to 1997, apparently convicted of a number of offences under the *Wildlife Act*, S.Y. 1986, c. 178. (Unless I explicitly state otherwise, all references to the *Wildlife Act* in this judgment are to the 1986 *Act*, as amended from time to time, rather than to the current *Wildlife Act* passed in 2001). It does not appear that any of those infractions were considered sufficiently serious to result in the suspension or cancellation of his guide outfitter certificate, or in the revocation of his outfitting concession.

[6] In September of 1997, a hunter, who was a client of Mr. Heynen's, shot and killed an undersized sheep. Rather than reporting the event, as required by the *Wildlife Act*, Mr. Heynen took steps to conceal it, assisting the hunter in burying the sheep, and then denying that the event occurred when questioned by conservation officers. Mr. Heynen was charged with wasting big game meat and with failing to report a violation of the *Act*. He pleaded guilty to the charges immediately, and was fined a total of $8,000, which was reduced to $4,000 by consent on an appeal. The Court also suspended his licence to hunt for one year, from October 1, 1997, to September 30, 1998. The suspension was also reduced on the consent appeal, so that it terminated on March 31, 1998, which was the expiry date of the licence.

[7] In June of 1998, government officials gave some consideration was given to refusing to issue Mr. Heynen a new guide outfitters certificate, but, ultimately, the Minister agreed to its issuance, subject to certain reporting conditions. It appears that Mr. Heynen failed to comply with those conditions, and charges were laid alleging a failure to comply with conditions of the certificate. Before those charges were proceeded with, a client of Mr. Heynen alleged that during a hunt a guide killed an old horse and used it as bear bait, in violation of the *Wildlife Act.* Some corroborating evidence was located, and further investigation led to a number of charges against Mr. Heynen under the *Wildlife Act* in respect of the 1998 season. In all, there were 21 charges.

[8] As a result of concerns over these matters, Mr. Heynen's outfitter's certificate was cancelled in January 1999, pursuant to s. 108(2)(a) of the *Wildlife Act*, which provides that:

> (2) An outfitter's certificate may be cancelled or suspended in whole or in part by the Executive Council Member where
>
> (a) in the opinion of the Executive Council Member the outfitting business of the holder of the certificate is not conducted in compliance with this Act

[9] The letter advising Mr. Heynen of the cancellation also indicated that no certificate would be issued for the 1999-2000 season. The government official also advised Mr. Heynen that further sanctions might be imposed by the courts in the *Wildlife Act* prosecutions, or by the Ministry once the quasi-criminal proceedings were complete.

[10] Of the 21 charges against Mr. Heynen, the five dealing with breaches of licence conditions were severed at the outset. Ultimately, four of those five resulted in

acquittals, on the basis of the courts finding that the Minister did not have the power to issue licences subject to the conditions in question. Mr. Heynen pled guilty to the fifth charge - failure to ensure that guides completed certain paperwork - and was fined $750.

[11] Of the remaining 16 charges, one was stayed prior to trial. The other 15 counts were tried before Stuart C.J., of the Territorial Court, who delivered a lengthy judgment, 2000 YTTC 502. Mr. Heynen was convicted on six counts and acquitted on eight. A conditional stay was entered on one charge, based on the *Kienapple* principle. Fines totalling $20,000 were imposed. All of the offences for which Mr. Heynen was convicted stemmed from his employing too few guides in the 1998 season. The charges related to a failure to have a guide for each non-resident hunter, or to allowing unqualified or incapable guides to accompany non-resident hunters.

[12] Mr. Heynen was acquitted on the three charges related to the bear-baiting incident. Although the judge appears to have considered it most likely that Mr. Heynen was guilty of the offences, he did not find them proven beyond a reasonable doubt.

[13] An appeal was taken from five of the convictions, and a cross-appeal was taken from five of the acquittals. In a decision cited as 2001 YKSC 534, Haines J. of this Court dismissed Mr. Heynen's appeals and allowed the Crown appeals, substituting convictions on three counts, and ordering a new trial on the remaining two counts.

[14] Mr. Heynen commenced an appeal from the Haines J. decision. The Ministry of Renewable Resources made it clear that it would not be making any decision on lifting

the cancellation of the outfitter's certificate or on imposing additional sanctions until all appeals had been exhausted.

[15] Mr. Heynen's five-year grant of an outfitting concession was to expire at the end of March 2002, and he applied for renewal. He abandoned his appeal to the Court of Appeal at the end of February 2002, probably in order to enter into discussions with the Ministry of Renewable Resources.

[16] On March 15, 2002, Mr. Heynen received a letter from the Deputy Minister of Renewable Resources indicating that he was recommending to the Minister that he revoke Mr. Heynen's concession. He cited the following reasons for the recommendation:

1. The 1997 offences relating to the concealment of the killing of an undersized sheep; and
2. The convictions on nine counts tried before Stuart C.J, involving failure to provide a separate guide for each hunter.
3. The conviction for failing to comply with the licence condition requiring the completion and filing of certain forms.

He gave Mr. Heynen until March 25, 2002, to respond, a period of approximately one week.

[17] Mr. Heynen's response discussed his years of working in the guide outfitting industry, the hardships that had recently befallen him, and a chance meeting he had

had with the Minister's father. He discussed some of the matters for which he was convicted, essentially denying that he was guilty of most of them.

[18] On March 27, 2002, the Minister wrote to his Deputy, and indicated that after a thorough review of the materials provided by him and by Mr. Heynen, he concurred with the recommendations that the outfitting concession be cancelled. He requested that the Deputy Minister draft a decision letter to be sent to Mr. Heynen.

[19] I note, in passing, that there may be concerns about the different roles that the Deputy Minister played in respect to the matter, both in making what appear to have been submissions, and in writing the decision. However, as this matter was not argued before me, I will not address it.

[20] The letter, signed by the Minister, but apparently drafted by the Deputy Minister, states that the Minister was not persuaded that the convictions entered against Mr. Heynen were erroneous, and that he accepted that the offences occurred. He noted that the privilege of being granted exclusive outfitting rights carried with it corresponding obligations to operate professionally and within the law, and stated:

> Outfitters generally operate in remote locations that are not easily accessible and cannot be effectively scrutinized by enforcement personnel. For these reasons, the integrity of an outfitter as evidenced by a willingness to comply with the Act and Regulations is of great importance.

[21] Finally, the Minister acknowledged the personal circumstances set out in Mr. Heynen's letter, but concluded that these could not take precedence over his responsibility to uphold the public interest and the integrity of the Yukon guiding industry.

[22] Approximately three months following the revocation of Mr. Heynen's outfitting concession, the matters that had been remitted to the Territorial Court by Haines J. came on for hearing. In light of the revocation of the outfitter concession, the Crown elected to stay the two charges that had been remitted to the court for new trials, and sought no additional penalty in respect of the three convictions entered on appeal.

**The March 13, 2002 Memorandum**

[23] I have omitted, to this point, to discuss one important document that appears in evidence. It is an unsigned memorandum dated March 13, 2002. Notwithstanding the lack of letterhead, signature, or any indication of the intended recipient, this appears to be a relatively formal document. It is entitled "Considerations Respecting the Recommendation for the Revocation of the Outfitting Concession Currently Held by Klaas Heynen." It runs to eight pages, and is significantly more detailed than the March 15, 2002 letter to Mr. Heynen, outlining the reasons that a revocation of the concession is being considered. This document was not provided to Mr. Heynen until well after this litigation had commenced.

[24] The March 13 memorandum outlines the statutory framework of the *Wildlife Act*. It mentions that Mr. Heynen had nine convictions for *Wildlife Act* violations prior to 1997, and that several of his guides had also been convicted. It states that:

> In spite of efforts by conservation officers to correct the unsatisfactory behaviour, Mr. HEYNEN seemed to be unwilling to make the necessary effort to ensure compliance with the requirements established by the Act.

Again, this is much stronger language than used in the March 15 letter received by Mr. Heynen.

[25] The memorandum then outlines the details of the 1997 convictions in respect of the concealment of the killing of an undersize mountain sheep.

[26] The memorandum goes on to state that:

> [A]lthough consideration was given to refusing to issue an outfitter's certificate valid for the 1998 season, the decision was made instead, to take a less harsh approach, partly due to Mr. HEYNEN's early guilty pleas and expressed remorse regarding commission of the 1997 offences. On June 5th 1998, an outfitter's certificate was issued to Mr. HEYNEN which included several new conditions designed to assist conservation officers in determining if the 1998 operations were being conducted in compliance with the Act and Regulations. These new conditions were reviewed with Mr. HEYNEN and he agreed to them in writing, prior to issuance of the certificate….
>
> During August and September 1998, conservation officer discovered five separate breaches of the new conditions … and … initiated … charges alleging violations of section 53 of the Act (failure to comply with conditions of a licence, permit or certificate)…

The memorandum fails to disclose that those charges were dismissed on a preliminary motion on the basis that the conditions were not authorized by the statute.

[27] The memorandum then discusses the complaint of baiting of grizzly bears that led to the 1998 investigations. Again, the memorandum fails to disclose that Mr. Heynen was acquitted of the charges arising out of the bear-baiting incident.

[28] The memorandum then lists the convictions that were secured against Mr. Heynen, Kusawa Outfitters and four of their guides. It recommends a revocation of outfitting concession.

[29] There follows a three-page portion of the memorandum under the heading "Summary of Reasons for Further Administrative Action." With the exception of a few

mild comments about public sentiment, this section is basically argument in favour of revoking the concession.

[30] It is difficult to know what the purpose of this memorandum was. The affidavit to which the document is attached merely states:

> On June 26, 2006, Ross Leef reviewed the documents attached to this affidavit and confirmed that to the best of his recollection they formed the basis of the decisions with respect to the cancellation of the annual outfitting certificates and the revocation of the concession.

Mr. Leef was, during at least some of the period from 1999 to 2002, the Director of the Field Services Branch of the Ministry of Renewable Resources.

[31] Counsel for Mr. Heynen invites me to find that the March 13, 2002 memorandum was written by the Deputy Minister for the Minister to consider in making a decision as to whether or not to revoke the concession. Counsel for the Minister, on the other hand, argues that the document is more probably a briefing note that led the Deputy Minister to recommend cancellation. She argues that I should not presume that the document was one on which the Minister relied in making his decision.

[32] I am not prepared to conclude that the document was prepared by the Deputy Minister, nor that it was prepared for the Minister. The tone of frustration in the document seems to me to be far more consistent with it having been written by someone closer to the situation than the Deputy Minister would have been. It is unlikely that the Deputy Minister would have had the time or inclination to research and write a document with this amount of detail. Further, the document speaks of the Minister in the third person, using phrases such as “The Minister must now decide on the most appropriate response.” Had the document been written by the Deputy Minister for the

Minister, I would have expected it to say, “You must now decide on the most appropriate response.”

[33] On the other hand, I find that, on the balance of probabilities, the document did go to the Minister. I say this for a variety of reasons. Firstly, the paragraph of the affidavit that I have quoted above states that this document (among others) “formed the basis of the decisions with respect to the cancellation of the annual outfitting certificates and the revocation of the concession.” It is obvious that this document could not have formed the basis for decisions to cancel annual outfitting certificates – that had already occurred by March 13, 2002. The only decision to be made was whether or not to revoke the concession. That decision was for the Minister.

[34] Further, the Minister’s memorandum to his Deputy of March 27 states:

> I have thoroughly reviewed the materials provided to me by yourself respecting the matter.
>
> I have also reviewed the letter provided to me by Mr. Heynen at 10:55 am on March 25, 2002.

[35] Had the March 15, 2002 letter from the Deputy Minister to Mr. Heynen been the only document that the Minister received from his Deputy, I would have expected it to be referenced specifically. In using the phrase, “the materials provided to me by yourself,” I take the Minister to be referring to more than a single document.

[36] Finally, I note that it is the defendant and only the defendant that is capable of shining light on the nature of the March 13, 2002 memorandum. While I acknowledge that the passage of time may have made it more difficult to establish what precisely was before the Minister, I would have expected some further evidence of those difficulties, or

some evidence of the nature of the March 13 memorandum. In the absence of such evidence, I am prepared to draw an adverse inference against the defendant. I find that the March 13, 2002 memorandum was a document that formed part of the record before the Minister when he made his decision.

**The Course of the Litigation**

[37] Before turning to the legal issues before me, I wish to comment briefly on the course of this litigation. I should state, at this point, that the counsel who argued the case in court were not involved in the litigation until relatively recently. My criticism of the manner in which the litigation progressed should not be seen as being directed at them.

[38] The decision to revoke Mr. Heynen's concession was taken on March 27, 2002, and appears to have been communicated to him on March 28, 2002. Mr. Heynen appears to have attempted to take a political route to having the decision changed, as indicated by an exchange between the Minister and an opposition member in Hansard for May 6, 2002. Not surprisingly, the Minister, as an administrative decision-maker, did not consider it appropriate to elaborate on his reasons for decision in the House.

[39] A general election was held on November 4, 2002, some seven months after the Minister's decision. Mr. Heynen indicates that this gave him some hope that the decision might be reversed, as the party that had been in opposition, and which had been supportive of him, was now in power. He says that he negotiated with the Government from 2002 until 2004, and that the Government commissioned a

confidential report on the matter, which was delivered to it early in 2005. Mr. Heynen's hopes for a settlement or reconsideration by Government, however, were not realized.

[40] The litigation took a great deal of time to come to fruition. The first cause of action was launched in October 2002. A writ of summons, endorsed with the statement of claim, was filed at that time. It did not challenge the revocation of the outfitting concession, but instead sought merely a declaration that the cancellation of Mr. Heynen's outfitter's certificate was "null and void *ab initio,*" and a declaration that Mr. Heynen continued to be entitled to a certificate.

[41] It is, with all due respect to its author, a muddled pleading. It is apparent that the cancellation of the outfitter's certificate could not have been a "nullity". It may be that there were grounds to quash the Minister's decision, but there does not appear to me to be any plausible argument that it was "void *ab initio*".

[42] It is also strange that the matter was commenced by writ. One would have thought that if the matter was as clear-cut as the statement of claim suggests, then the appropriate procedure would have been a summary one, and, in any event, the natural remedy would have been seeking *certiorari* by petition, pursuant to Rules 63 and 10.

[43] Finally, it is apparent that the action could not have resulted in the reinstatement to Mr. Heynen of the guide outfitting business for two reasons: If the cancellation of the certificate had genuinely been a nullity, it would nonetheless have expired long before the writ was issued. Secondly, it failed to attack the revocation of the concession, which was absolutely critical to Mr. Heynen's ability to return to the business.

[44] No step was taken to challenge the revocation itself until March 20, 2003, a few days short of one year after it had occurred. Even at that time, all that was filed was a writ with an endorsement, seeking judicial review and damages. Again, to the extent that a remedy in the nature of *certioriari* or mandamus was sought, the matter ought to have been brought by petition.

[45] In any event, a statement of claim was not filed until December 1, 2004. A statement of defence followed on December 21, 2004. The defendants did not take steps, at that time, to sever the judicial review claims from the claims for damage. Indeed, the problem was compounded in April of 2005, when the parties obtained a consent order consolidating the two inappropriate actions.

[46] The judicial review aspects of the case became obscured by a battle over compensation; yet it seems clear (as the parties now seem to realize) that the only expeditious way to have this matter progress was to first determine whether the Minister's decision of March 27, 2002, would stand.

[47] I understand that the defendant, for some time, refused to provide documents to the plaintiff, on the basis that the matter was, in essence, a judicial review proceeding and therefore did not carry with it rights to discovery.

[48] The defendant should not have taken that position. If it wished to strike the claim, or force it to be converted to an originating application, it should have done so by application to the Court rather than presuming to decide what rules he would follow and what rules he would not.

[49] The error, however, is more serious than that. While it is true, as the defendants argued, that there are very limited rights to discovery in judicial review proceedings, this should not be seen as an excuse for a decision-maker to fail to disclose the record of decision.

[50] The duty to disclose the record is an ancient one; indeed, *certiorari* began as a two-stage process. The applicant first had to demonstrate to the Court that there was a complaint worthy of exploration – that part of the application normally proceeded *ex parte*. On being satisfied that the test was met, the superior court would order the decision-maker whose decision was being challenged to deliver up the record.

[51] The two-stage process has long since been collapsed to a single stage. Nonetheless, the idea that the record need not be disclosed or filed without a court order persists. While a more functional approach has been adopted in some jurisdictions (see Ontario's *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 10 which requires the filing of a record once a judicial review proceeding is initiated), even some jurisdictions which have adopted judicial review legislation there have adopted statutory provisions indicating that disclosure of the record is not mandatory until a court orders it (see B.C.'s *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 17).

[52] In a case like the present one, it ought to have been obvious to the parties that disclosure of the record would be essential. The defendant ought not to have resisted such disclosure.

[53] I do not, however, wish to suggest that the defendant's actions are responsible for the lengthy delays in having this matter proceed in an orderly manner. It was not

until January of this year that the plaintiff finally accepted that the matter had to proceed as a judicial review, and even more recently that the grounds were set out with precision, and the challenge was limited to the March 27, 2002 decision.

## Legal Issues – Propriety of the Decision

### A. Improper Exercise of Discretion

[54] I now turn to the legal issues. The first legal issue concerns the breadth of considerations that the Minister was required to bring to bear on his decision to revoke the outfitting concession. Section 100(1)(b) and s. 108(2)(c) of the *Wildlife Act* make it clear that the basis for revoking an outfitting concession is a conviction for specified offences.

[55] First of all, s. 100(b), the section under which the revocation occurred, states:

> An outfitting concession may be revoked or suspended in whole or in part where:
>
> (b) an outfitter's certificate issued in respect of the concession may be cancelled under paragraph 108(2)(c),

Paragraph 108(2)(c) then, which is incorporated by reference into 100(1)(b), states:

> An outfitter's certificate may be cancelled or suspended in whole or in part by the Executive Council Member where
>
> (a) the holder of the certificate is convicted of an offence in relation to the outfitting business, under Sections. 42, 48.

Section 48 is a failure to report violations of the *Act*, and s. 42 is failing to furnish a separate guide for each non-resident hunter:

[56] The plaintiff argues that the Minister, therefore, in purporting to act under s. 100(1)(b), was not entitled to consider anything other than the specified offences. In taking to account other matters, the plaintiff says, the Minister based his exercise of discretion on completely irrelevant factors.

[57] The plaintiff also says that the Minister had a duty to consider the details of the activities that led to the convictions rather than just the convictions themselves. If this were not a requirement, he says, what scope would there be for the Minister to exercise discretion?

[58] The defendant argues that s. 100(1)(b) must be examined in the context of the statute as a whole. He argues that in making a decision under s. 100(1)(b), the broader public interests reflected in the statute can be taken into account by the Minister.

[59] The defendant argues that the Act has several purposes, including conservation and public safety. I agree that those are concerns of the statute; other concerns are also reflected in the statute. Certain aspects of the statute are primarily concerned with ensuring that the wildlife resource is exploited in an economically advantageous manner. The statute also exhibits a concern with control of what are considered “pest species”.

[60] The defendant further argues that since broad public interests are involved in the statute, the Minister is entitled to considerable deference in respect of the exercise of discretion. He cites *Mount Sinai Hospital Center* v. *Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at paragraph 58, for the

proposition that Ministers of the Crown enjoy significant deference in respect of discretionary decisions. The Court said:

> Decisions of Ministers of the Crown in the exercise of discretionary powers in the administrative context should generally receive the highest standard of deference, namely patent unreasonableness. This case shows why. The broad regulatory purpose of the ministerial permit is to regulate the provision of health services "in the public interest". This favours a high degree of deference, as does the expertise of the Minister and his advisors, not to mention the position of the Minister in the upper echelon of decision makers under statutory and prerogative powers. The exercise of the power turns on the Minister's appreciation of the public interest, which is a function of public policy in its fullest sense. …

[61] While I accept this general proposition, it is easy to overstate the degree of deference which a Minister should enjoy. Ministers, no less than other decision makers, are required to exercise their discretion in accordance with the limits of the statute. One need only recall the seminal case of *Roncarelli* v*. Duplesis,* [1959] S.C.R. 121, to appreciate that Ministers of the Crown occasionally stray beyond their statutory powers in making discretionary decisions.

[62] The plaintiff cites the case of *Re Multi-Malls Inc*. v. *Minister of Transportation and Communications*, 73 D.L.R. (3d) 18:

> … The exercise of [an executive] discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question the authority must disregard those irrelevant collateral matters.

[63] The Minister is not entitled, in my view, to consider all of the purposes of the *Wildlife Act* in exercising his discretion under section 100(b) of the Act. Given that

sections 100(1)(c) and 100(1)(d) specifically allow the Minister to revoke concessions on the basis of the interests of conservation or other pressing public interests, it does not seem to me that s. 100(1)(b) can reasonably be interpreted to allow the same broad considerations to be taken into account. The *Act* makes a clear distinction between revocations based on the outfitter ceasing to be qualified (s. 100(1)(a)) and having been convicted of certain serious *Wildlife Act* offences (s. 100(1)(b)) on the one hand, and those based on conservation (s. 100(1)(c)) and public interest (s. 100(1)(d)) on the other. Where a concession is revoked on the latter grounds, there is compensation. When it is based on the former, there is not. If effect, the *Act* distinguishes between fault and no fault revocations of a concession.

[64] I agree, therefore, with the plaintiff's position that the Minister's focus, in exercising his discretion, has to be on the seriousness of the convictions under the *Act*. I do not agree, however, with the narrow approach to that question that he suggests. In determining whether a conviction is serious enough to warrant a revocation, the Minister must be free to consider the full context of the conviction: Is it an isolated event or part of a pattern of disrespect for the principles of the statute? Is there, in the post-offence actions of the guide outfitter, an indication of remorse, and a determination to avoid offences in the future, or is there a lackadaisical or profit-oriented attitude to violations?

[65] The Minister is entitled to deference in his exercise of discretion, but he must not exercise the discretion for an improper purpose, or without heeding the limits of what may be considered. Accordingly, I find that the Minister was entitled to consider the plaintiff's history as a guide outfitter, his previous convictions, and his level of cooperation with conservation authorities in trying to ensure that violations were not

repeated. He was not entitled to consider broader public interest issues, such as the public's mood with respect to hunting, or the need to reduce guiding in areas with development pressures, for example.

[66] The Minister's decision does not appear to me to take into account any irrelevant considerations. While there are very limited references to public opinion in the memorandum of March 13, 2002, they do not assume a large role in that memorandum, and I believe that it is safe to conclude that the irrelevant considerations did not motivate the Minister's decision to revoke the concession. They are not mentioned in his own decision.

[67] As the plaintiff points out, discretionary decisions must also take into account mandatory considerations – those that are so obviously contemplated by the statute that it is a jurisdictional error to fail to take them into account. The plaintiff says that the absence of detailed information concerning the convictions in the material that was in front of the Minister must be considered to be a fatal flaw in the decision-making process.

[68] With all due respect, I do not agree. The details of the convictions were certainly factors which the Minister was entitled to take into account in making decisions. He was not required, however, to search out minute details on his own when the plaintiff did not provide them to him. The Minister made no error when he reviewed the evidence before him before exercising his discretion. If the plaintiff felt that details of the convictions would be of assistance to him, he ought to have included those details in his submissions to the Minister.

**B. Duty of Procedural Fairness**

[69] There can be no doubt that Mr. Heynen was entitled to procedural fairness in respect of the Minister's decision. Canadian courts have developed a flexible approach to procedural fairness, recognizing that a number of factors influence the degree to which procedures must be put in place to protect the interests of those affected by decisions. Procedural fairness requirements are functional, not technical, in nature. As L'Heureux-Dubé J. said in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 685:

> It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (*Judicial Review of Administrative Action* (4th ed. 1980), at p. 240), the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome.

[70] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, L'Heureux-Dubé J. identifies a number of factors that may be considered in determining whether or not a decision has been made in accordance with the requirements of procedural fairness:

> 23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In Knight, supra, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that

> procedural protections closer to the trial model will be required by the duty of fairness….
>
> 24 A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates". The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted:[cites omitted]
>
> 25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. …
>
> 26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. …
>
> 27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, supra, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282, per Gonthier J.

[71] In the case at bar, the decision is not purely adjudicative in nature; rather it is discretionary. Still, the resemblance of the decision to those that courts must make is obvious. Section 100(1)(b) is essentially penal in nature. It aims to prevent a wrongdoer from benefiting from his or her wrongdoing, and imposes a stiff economic penalty in the process, presumably for denunciative or deterrent purposes. In such a context, it seems axiomatic that the person whose rights are at stake must be provided

with at least a summary of the allegations made against him or her, and the opportunity to refute the allegations, at the very least in writing.

[72] There is no appeal procedure provided for in the statute. The outfitter has one opportunity to make his case. It is essential that he or she know what allegations are before the Minister in order to do so.

[73] While the decision in this case was important to Mr. Heynen, the Minister must nonetheless have some flexibility to establish fair but efficient procedures. The fact that the statute specifies that it is the Minister is the one to make the decision militates against any suggestion that a trial-like hearing is intended to take place. A "paper hearing" will be sufficient, provided that it gives the guide outfitter a genuine opportunity to answer the accusations made against him or her.

[74] In the case at bar, Mr. Heynen was provided with the letter of March 15, 2002, setting out certain matters that were of concern to the Deputy Minister. He had only a short time (less than a week) to formulate a reply. In light of the gravity of the situation for him, that seems like a very short length of time. He did not, however, attempt to arrange an adjournment, or even suggest that the timeframe he was provided was insufficient. In the circumstances, I would not find that the compressed timeframe for responding to be a violation of rights of procedural fairness.

[75] Indeed, had the letter of March 15, 2002, been the basis of the Minister's decision, I do not think that any fault could have been found with the procedure that was followed. The difficulty for the defendant is that the memorandum of March 13, 2002, which I have discussed in some detail, contains many allegations that are not

mentioned in the March 15, 2002 letter. Mr. Heynen had no opportunity to even know that these other allegations were before the Minister, let alone any opportunity to respond to them.

[76] In the circumstances, I find that the failure of the defendant, or someone within the Ministry, to disclose the March 13, 2002 memorandum (or at least a summary of its allegations) to Mr. Heynen, deprived him of his right to confront the case against him – in other words, it violated the sacred principle of *audi alteram partem* – the right to hear, or know, the case brought by the other side.

[77] I will mention that the plaintiff also alleges bias against the Minister, on the basis that the March 13, 2002 memorandum is argumentative and not neutral on the issue of revocation of the concession. In support of this argument, he cites *Baker v. Canada (Minister of Citizenship and Immigration)*, in which a memorandum of a senior official was deemed to be the reasons of the Minister.

[78] This case is distinguishable from *Baker*. It cannot be said that the memorandum represented the Minister's thinking – the reasons that the Minister gave for revoking the concession borrow very little, if anything, from the March 13 memorandum.

[79] Aside from that, it is important to appreciate the nature of the process that was being undertaken. The Minister's department, after long involvement with Mr. Heynen, and without ulterior motives, concluded that it should recommend that his concession be revoked. It appears that the next step was intended to be one in which Mr. Heynen had an opportunity to refute the concerns of the Department. This was, effectively, a show cause hearing. The Minister's department was fully entitled to make a recommendation

to the Minister; indeed, it is difficult to conceive of any other way that this decision could have come to be made. The Minister was entitled to take the recommendation seriously, and to require Mr. Heynen, in the circumstances, to show cause why he should not revoke the concession.

[80] Had Mr. Heynen been given a genuine opportunity to refute the allegations that were before the Minister, I would not have found that the force with which the allegations were put forward constituted a reasonable basis for an apprehension of bias on the part of the Minister. However, the breach of procedural fairness that I have found is sufficient to grant judicial review, subject to discretionary bars.

**C. Patently Unreasonable Penalty**

[81] I will deal also with the third basis for judicial review cited by the plaintiff, that is that the penalty was patently unreasonable. The plaintiff's final argument is that the revocation of the concession was so draconian a penalty that it should be held to be patently unreasonable.

[82] I am, with respect, unable to accept that argument. It is apparent that the standard of review in respect of the penalty ought to be one of patent unreasonableness. Indeed, all counsel agreed on that. The Minister will be expected to have greater expertise in respect of the needs and norms of an industry that he regulates than does the Court. Further, the issue of penalty is one that is highly discretionary.

[83] In this case, there were repeated and serious violations of the *Wildlife Act.* The nature of the guiding industry makes it very difficult to detect the "bad actors". To a

large extent, proper adherence to the norms of the industry and to the statutory imperatives is dependent on the integrity of guide outfitters. The violations here were not merely technical or inadvertent. They do not appear to have been isolated events. In the circumstances, the penalty of revocation of the concession, while very severe, is not one that is so harsh or disproportionate as to require the court to intervene.

[84] To summarize, then, I do not find that the Minister erred in taking into account irrelevant considerations or in failing to take into account mandatory ones. I do not detect any reasonable apprehension of bias in the decision-maker, nor do I find the penalty imposed to be so disproportionate or so harsh as to be patently unreasonable. Finally, although I do not find any fault with the general procedures adopted by the Minister in making his decision, I do find that the failure to disclose the March 13 memorandum to Mr. Heynen prior to coming to a decision was a serious breach of his right to procedural fairness.

**Legal Issues – Availability of a Remedy**

[85] There are two issues left to consider. First, given that a breach of the requirements of natural justice or procedural fairness has been made out, is there a remedy available? Second, if there is a remedy available, ought it to be refused on the basis that the plaintiff is guilty of unreasonable delay in bringing the matter to court?

[86] My concern about remedy stems from the fact that the statutory scheme changed less than one week after the Minister made his decision. The *Wildlife Act,* S.Y. 1986, c. 178, was repealed by the *Wildlife Act*, S.Y. 2001, c. 25, which came into force on April 1, 2002. (The latter statute is now R.S.Y. 2002, c. 229). Given that the new *Act*

made substantial changes to the law, is it still possible to remit the matter to a decision-maker?

[87] In this case, the answer to the question is not difficult. While there are substantial changes to the *Wildlife Act* as a result of its repeal and replacement, the provisions of the two statutes that are relevant in this case are little changed. Sections 79(1)(b) and 57(1)(c) of the current *Act* correspond almost exactly to sections 100(1)(b) and 108(2)(c) of the 1986 *Act*. While there has been some change in the types of convictions that can found a revocation of a concession, the issues that we are concerned with in this case (failing to have a guide for each non-resident hunter, and, possibly, failing to report a violation of that *Act*) are contained in both versions of the *Wildlife Act*.

[88] Section 23(2)(c) of the *Interpretation Act*, 2002, R.S.Y. c. 125, provides that:

> (2) When all or part of an enactment is repealed and other provisions are substituted therefor,
>
> …
>
> (c) every proceeding taken under the enactment so repealed shall be taken up and continued under and in conformity with the provisions so substituted, as far as consistently may be;

[89] I am satisfied, therefore, that if I were to quash the decision of the Minister, the matter could be remitted for consideration by the current Minister under s. 79(1)(b) of the current *Act*.

**Legal Issues - Delay**

[90] I now turn to the most difficult issue, that of delay. I have concluded that notwithstanding that the Minister's decision was made in a manner that did not conform with the requirements of procedural fairness, the decision ought, nonetheless, be allow to stand. There has, in this case, been undue and inexcusable delay in bringing this matter to court. I am satisfied that the failure of the plaintiff to assert his rights in a timely manner should result in the court exercising its discretion against granting judicial review.

[91] The defendant cites a number of cases dealing with the issue of delay. First of all, *Friends of the Oldman River Society v. Canada Minister of Transport,* [1992] 1 S.C.R. 3, a case in which the Court did not refuse remedy by reason of delay, but made a general statement that summarizes the law. At paragraph 105, the Court said:

> There is no question that unreasonable delay may bar an applicant from obtaining a discretionary remedy, particularly where that delay would result in prejudice to other parties who have relied on the challenged decision to their detriment, and the question of unreasonableness will turn on the facts of each case [citations omitted].

[92] The defendant also cites *Turnagain Holdings Ltd.*, a decision of the British Columbia Supreme Court, [2002] B.C.J. 2391 at para. 97. While that case has some superficial resemblance to this case in that it involves a guide outfitting territory, there are significant differences in the facts. While it is example of a case where delay precluded judicial review, it is of limited assistance to me, as it depends very much on its facts:

[93] In *Turnagain*, however, the court relied on the off-cited House of Lords decision in *O'Reilly* v. *MacKinnon*, [1983] 2 A.C. 237 (H.L.) at 280-1:

> The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.

[94] Traditionally, the period for judicial review has been short. Indeed, the trend appears to be to shorten it even further in statute. For example, s. 18.1(2) and s. 28.2 of the *Federal Courts Act*, R.S.C. 1985, c. F7, provides that normally judicial review must be sought of federal boards and commissions within 30 days of their decisions. The recently enacted *Administrative Tribunals Act* in British Columbia, S.B.C. 2004, c. 45, s. 57 provides for a 60 days limitation period.

[95] I acknowledge that these statutes do not affect the current proceeding, and indeed they do shorten what has traditionally been the acceptable delay period in judicial review. However, they are indicative of the general philosophy in the law of judicial review, which is that public decision-making ought to take place in an expeditious manner.

[96] In the case at bar, there is some evidence of prejudice caused by delay, but I must say that the evidence of prejudice is not decisive. It is clear that the decision on sentencing following this Court's findings of guilt on three counts was affected by the understanding that a severe financial penalty had been inflicted on the plaintiff. Further, and similarly, the Crown’s decision not to proceed to trial on two counts remitted to the Territorial Court under the *Wildlife Act* seems to have been based on the fact that

enough of a penalty had already been imposed. These matters, however, disclose very limited prejudice to the public in the broader context, whether that broader context is the administration of the *Wildlife Act*, or simply the context of dealing with Mr. Heynen. Whatever sanctions might have been imposed, even if there had been findings of guilt on all five counts, must pale in comparison to the loss of the outfitter concession.

[97] There is some evidence of prejudice in the fact that a final agreement with First Nations with claims over the guiding territory has been reached. Counsel, however, was unable to explain precisely how the concession would affect the aboriginal settlement, and I am left to speculate. I say only that if this were a serious prejudice, I would have expected more evidence from the Crown, and perhaps an intervention application by any affected aboriginal group.

[98] There is, then, beyond the general prejudice caused by delay in public decision making, only minor prejudice proven in this case.

[99] The other consideration is whether the delay is excusable and whether an adequate excuse has been given for it.

[100] The plaintiff says that following the decision of the Minister he was shown some support by the opposition party. He had some hope that if they won the election, they might be willing to assist him. When they did succeed in the election, he says, he had discussions with the new government and was encouraged. Ultimately, the new government commissioned a confidential report, which he hoped would help him. The plaintiff says that he delayed in pursuing the judicial review until those procedures were concluded.

[101] The plaintiff says that there is a strong policy in the courts in the favour of settlements, and that the court ought, therefore, to accept settlement negotiations, even lengthy ones, as proper explanations for delay.

[102] I find the plaintiff's explanation difficult to accept. While courts should and do encourage settlements in many contexts, care must be taken in accepting private settlements as things to be fostered in the context of public law. Here, the Minister of Renewable Development made a discretionary administrative decision. Though he was a politician, the decision was in no sense meant to be a political one. Once he made it, the decision was final. A new Minister had no discretion to reverse it, much less did members of the House, other than the Minister of Renewable Development, have any discretion to reverse it, other than, perhaps, through new legislation. Much less, again, did unelected supporters or members of the governing party have any right to interfere with the decision. Private agreements over public law disputes ought not, in my view, to be generally encouraged, at least where the issues are not of a policy or political nature.

[103] It may be argued, however, that all Mr. Heynen was doing was exhausting alternative remedies, something generally encouraged in public law. It must be recognized, however, that there are often numerous avenues of redress that an aggrieved party may pursue: the ombudsman's office, for example, or informal intervention from the person's member of the assembly. A person is welcome to choose those remedies as alternatives to the courts. A person cannot, however, expect to serially approach various agencies in the hope that eventually one will accede to his or her viewpoint.

[104] Judicial review is intended to be a speedy summary remedy. The period of one year prior to the filing of the writ seeking judicial review in this case was too long, and suggests political motivations behind the delay. The further delays in filing the statement of claim, and in settling upon judicial review as the nature of the litigation are also not inspiring

[105] In my view, great damage would be occasioned to our system of administration of justice if delays of the sort that occurred here were countenanced in the name of amicable settlements of public law issues. Such issues generally should be dealt with in the open, rather than in private discussions with politicians or in confidential reports commissioned by a government.

[106] In the case at bar, there is some prejudice occasioned by the delay, even beyond the general prejudice that the delay creates, although, as I say, the evidence of such prejudice is fairly minor. The explanation for the delay, however, is very much wanting, and, to my mind, it would be a dangerous precedent to accept political negotiations as a valid basis for sleeping on legal or equitable rights.

[107] Accordingly, I exercise my discretion against granting *certiorari* in this case on the grounds of unreasonable delay.

[Submissions on Costs]

[108] THE COURT: My inclination is to accept Mr. Robertson's position in view of the strange way that this matter proceeded, and in view of the divided success on the issues, even acknowledging that the plaintiff was, ultimately, unsuccessful. However, in

light of Ms. Gawn's position, what I am prepared to do is to adjourn the matter of costs. If the defendant chooses to seek costs within a reasonable time period, counsel can provide submissions.

[Discussion between the Court and Counsel as to timing]

[109] THE COURT: All right. Well, I do not want to preclude negotiations on that issue and I, frankly, will not be back to my office in Vancouver until the second week of August, so you are welcome to wait until then if you choose to provide any submissions.

{Discussion between the Court and Counsel}

[110] THE COURT: Thank you very much, counsel, for what were very detailed and helpful submissions. I want to reiterate that any criticism that I have made of the conduct of this litigation is not directed at counsel who have appeared on this hearing.

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GROBERMAN J.