



Environmental Appeal Board

APPEAL NO. 96/25 - WILDLIFE

In the matter of an appeal under section 103 of the *Wildlife Act*, S.B.C. 1982, c.57.

BETWEEN: Dennis Dunn **APPELLANT**

AND: Deputy Director of Wildlife **RESPONDENT**

BEFORE: A Panel of the Environmental Appeal Board
David Perry, Panel Chair

DATE OF HEARING: October 15, 1996

PLACE OF HEARING: Victoria, BC

APPEARING: For the Appellant: Dennis Dunn
For the Respondent: Geoff Swannell

APPEAL

This appeal is brought by Mr. Dennis Dunn against the decision of the Deputy Director of Wildlife issued May 13, 1996.

In his decision, the Deputy Director, Mr. William Munro, refused the appeal. Mr. Dunn had sought the return of the head of a thinhorn mountain sheep which request had been denied by the Regional Manager. Mr. Munro upheld this refusal on the basis that the sheep in question did not meet the definition of a full curl thinhorn ram mountain sheep and, accordingly, had been killed contrary to the *Wildlife Act* and Wildlife Regulations.

BACKGROUND

Mr. Dunn killed the animal in question on August 5, 1993. Following an investigation by the local wildlife branch, Mr. Dunn was charged with killing a thinhorn mountain sheep ram at a time not within the open season contrary to section 27(1)(c) of the *Wildlife Act* and contrary to section 8(1) of Schedule 6 of the Hunting Regulation.

At the trial of this matter before Her Honour Judge Trueman, the charge was dismissed. The basis for the Honourable Judge's decision was twofold. First, the Judge held that although the head of the ram presented in court did not meet the size requirement under the Hunting Regulations because of the passage of time between the date of killing the ram and the trial in December 1994, the horns may well have shrunk and, accordingly, there was a reasonable doubt as to whether or

not the ram was full size at the time it was killed. In addition, the Judge held that although she believed that Mr. Dunn had admitted in his statement to the wildlife officers that the head was undersized at the time he killed it, that he may have been mistaken in the way he viewed the ram before killing it and accordingly there was reasonable doubt as to whether it was a full-sized ram.

Her Honour Judge Truman also ordered that the ram's head be confiscated because "Mr. Dunn knew, or thought, or believed that this animal did not meet the legal definition in British Columbia" at page 10 of the decision.

Mr. Dunn subsequently appealed the order of forfeiture made by the provincial court judge to Mr. Justice Errico. In Reasons for Judgment issued June 13, 1995, Mr. Justice Errico found that the order of forfeiture was *ultra vires* the power of a provincial court judge. However, this did not finally dispose of the matter as the Wildlife Branch still had the power to hold the ram's head. Because the Wildlife Branch continued to hold the property as belonging to the Crown, Mr. Dunn applied to the Wildlife Branch for possession of the head, appealed to Mr. Munro and finally he appealed to this Board.

APPELLANT'S ARGUMENT

Mr. Dunn makes two main arguments. First of all he argues that the definition of a full curl thinhorn sheep is flawed because it does not allow the killing of rams that meet class 4 or trophy standards. Second, he argues that there is a discrepancy between the definition of a full curl ram found in the field guide and that contained in the regulations and that the definition in the field guide is sufficiently misleading that he should be given the benefit of the doubt and allowed to keep the ram that he had killed.

Dealing first with the question of a flaw in the definition, Mr. Dunn cites the definition found at page 52 of the 1993/94 BC Hunting and Trapping Regulation synopsis. At that page there is a statement with respect to Skeena Region open seasons which says "thinhorn mountain sheep (rams only) full curl or greater." Mr. Dunn takes this to be a definition of animals that are allowed to be killed in this region. In his view, full curl means horns that have reached a 360° circle when viewed from the side.

In contrast, on page 70 of the same synopsis, there is found the following definition "full curl thinhorn ram—means any male thinhorn mountain sheep which has attained the age of eight (8) years as evidenced by yearly horn growth annuli as determined by the regional manager or his designate, or whose horn tip extends upwards beyond the forehead—nose bridge when viewed from the side."

At page 71 of the same synopsis, there is a diagram showing a full curl thinhorn sheep. The view is in profile of the ram's head and indicates that a legal horn curls around in a circle and protrudes slightly above the bridge of the nose just ahead of the ram's eye. An illegal horn curls around with the tip of the horn below the bridge of the nose when viewed from the side. The description underneath the pictures contains the following statement "legal rams cannot be identified unless viewed squarely from the side. Horn annuli do not constitute a good field guide for ageing

sheep. These field definitions adequately conform to legal definitions, copies of which are available at BC Environment offices....”

For ease of reference, the regulatory definition found in B.C. Regulation 190-84 under the *Wildlife Act* is also reproduced.

Full curl thinhorn ram mountain sheep means any thinhorn ram mountain sheep that has attained the age of eight years as evidenced by true horn annuli as determined by the regional manager or his designate, or whose horn tip, when viewed from the side at right angles to the sagittal plane of the skull, extends upwards beyond the dorsal surfaces of the suture joining the left and right nasal bones.

Mr. Dunn gave evidence that he studied the synopsis carefully before stalking and killing this particular animal. He did not have the regulations in front of him at the time that he was hunting. In Mr. Dunn's view, the statement "full curl" refers to a full circle. He believes that this was the more general definition which was illustrated by the diagram showing the horn extending above the tip of the ram's nose bridge. In his view, the written description of the horn tip extending upward found at page 70 was a less restrictive definition and was only to be referred to in the event that the circle was not complete.

Mr. Dunn also presented expert evidence from a former Wildlife Branch employee, Dr. David Hatler, who has acted as regional biologist for the Wildlife Branch. Dr. Hatler indicated that in his opinion the ram's head was a trophy animal and that he would not have seized it had he been asked.

RESPONDENT'S ARGUMENT

The Respondent says that the definition found in the regulations must prevail. Notes in the synopsis regarding "full curl" are not independent or alternative definitions but simply descriptive.

The Respondent also says that the regulation requires the observer to view the ram's head from a point of 90° to the sagittal plane, which was described as an imaginary plane bisecting the ram's head on a vertical cut. The observer must then align the furthest extent of the tip of the horn with the observation point. If this line, extending at a 90° angle from the sagittal plane, intercepts the ram's snout at a point below the bridge of its nose, then it is an illegal animal.

DISCUSSION

Dealing first with the issue of whether or not Mr. Dunn was misled by the definition, the Board finds that the statement "full curl" is meaningless without reference to both the diagram and the written description found at pages 70 and 71 of the synopsis. The simple statement on page 52 that full curl rams would be permitted to be killed does not create a separate independent definition based on whether or not the horns form a complete circle. Nowhere in either the synopsis or in the regulations is there a definition which makes reference to whether or not the horns form a geometric circle in determining whether or not they are full curl. Full

curl is always linked to whether or not the horn tip extends above the bridge of the nose. Accordingly, the Board finds that Mr. Dunn was mistaken in arriving at a separate definition based on whether or not a geometric circle had been complete and that whether or not the ram in question meets such a test is irrelevant in determining whether or not it is a legal ram.

With respect to the expert evidence from Dr. Hatler, the Board accepts his expertise in the sense of determining that this was a "trophy" ram and also the evidence of Mr. Dunn that it is of sufficient size to qualify for entry in the Pope and Young North American Record Book. However, neither one of these definitions determines whether or not this is a legal ram. There may well be differences in the definition of a "trophy" ram and the regulatory definitions. In fact, the category of trophy animal is likely a simpler definition to use in the field than the elaborate geometrical exercise required by the regulations. But, where there is a discrepancy, the regulation must determine whether or not the ram is a legal animal. Although Mr. Dunn makes a compelling policy argument as to whether or not the present standard is a rational one in managing this particular species of wildlife, this Board does not have the power to overturn regulations on the basis that they are bad policy.

Given that there is no definition other than one requiring the tip of the horn to extend beyond the bridge, Mr. Dunn's argument that this particular ram may never have become legal is also irrelevant. Mr. Dunn said that given that the ram in question had a horn tip which was already travelling backwards away from the bridge of the nose meant that in future years the horn tip may have actually begun to point downwards as it aged. Although that may well be the result with this particular ram that is irrelevant. The backup regulation states that the ram can be killed once it reaches eight years. All parties were in agreement that this particular ram was six years old. Once it had reached eight years then even though the horn growth pattern ensured that it would not meet the definition with respect to the tip rising above the bridge of the nose, it would certainly, at some stage in its life meet the definition of a legal ram based on its age.

Mr. Dunn's second main argument is that there is a discrepancy between the field guide and the regulation. He says that because on page 70 the word squarely from the side does not appear (although this is noted in the 1996-1997 synopsis) that the point of view of the observer has not been adequately defined. In order to view the ram according to the regulations, the head of the ram must be bisected by an imaginary plane through the mid-point of the skull. This is defined in the regulations as the sagittal plane. The observer is invited to observe the ram at a point at right angles to the sagittal plane in alignment with the tip of the horn.

Mr. Dunn argued that the definition only provided that the observer should be at right angles to the sheep's skull but did not identify at what point on the plane parallel to the sagittal plane the observer's point of view should be established. In other words, the definition only defines two points in a three dimensional field rather than three.

In support of this argument, Mr. Dunn states that squarely from the side for bighorn sheep means at a point where the horns on either side of the animal's head are aligned when viewed from the side.

This invites the observer to look at the sheep from a point on the plane at 90° to the sagittal plane directly opposite the centre of the skull of the sheep. This is in contradiction to the observer's point of view on thinhorn sheep where the observer must observe the animal at a point on the plane parallel to the sagittal plane but directly opposite the horn tip.

Although the Board agrees that this exercise of viewing the animal squarely from the side is a difficult one in the field, there is no doubt given the definition, that the legislature has adequately defined the point of view of the observer. With bighorn sheep, the point of view of the observer will be directly opposite the skull because the point of the horn is to be higher than parts of the head below the bridge of the nose. This will require the observer to be looking at the tip of the horn at a point adjacent to the skull. However, with the thinhorn sheep, the tip of the horn must reach above the bridge of the nose. In order to determine whether or not the tip is above the bridge, the observer must be at a point 90° to the tip of the horn, rather than directly opposite the skull of the sheep.

The Board notes that at no point can the observer stand at 90° to the skull of the particular ram's head in dispute in these proceedings and make the horn tip appear to be above the bridge of the nose. It is only possible to make the horn tip appear to be above the bridge of the nose by observing the sheep's skull from a point considerably below the skull. This is demonstrated in pictures provided to the Board by Mr. Dunn and by observation of the sheep's skull which was presented at the hearing.

Mr. Dunn argued in addition that it is very difficult to determine the sagittal plane given that the two horns may be of different size and therefore the sheep's head would not be square to the ground when determining the 90° sagittal plane. Although this is a difficult exercise, the explanation given of the method used to determine the sagittal plane of this animal is satisfactory to the Board. This consists of placing the horns in a holding device termed a "jig" which keeps the ram's head in an upright position. The horns are then viewed from the side to determine whether the regulatory test is met. Mr. Dunn correctly points out that because the ram's head rests on its uneven base in the jig that the head may not be directly upright. Accordingly, the estimate of the sagittal plane may be flawed. In this case, the wildlife biologist moved his point of view down to test the point where the tips rise above the bridge of the ram's nose. He found that his observation point was considerably below the tips of the horns before they appeared to be above the nose. The observations of the Wildlife biologist, Mr. Rick Marshall, are also supported by the photographic evidence and, in fact, by the evidence of Mr. Dunn, which indicated that it is necessary for an observer to be below the skull of the sheep looking up in order for the horn tip to appear to be above the bridge of the animal's nose.

Finally, the Board finds that the definition contained in the synopsis at pages 70 and 71 is an adequate reflection of the regulation. Although the definition at page 70 of the synopsis does not say "squarely" when observing the horn tip, it is clear from reading the definition at page 70 together with the illustration on page 71, that the observer should be at a point 90° to the animal's head at a point directly opposite the tip of the horn. No other reasonable definition is possible, otherwise the observer could simply crouch down to a point on the ground, look up at the animal's head from the side and attempt to make the tip of the horn appear as if it was rising above the bridge of the nose. This is an unreasonable interpretation of the definition and is not in accordance with the rules of statutory interpretation.

CONCLUSION

Accordingly, the Board rejects the appeal of Mr. Dunn and upholds the decision of the Deputy Director of Wildlife.

Mr. Dunn argues that because he was acquitted of the charge that this is equivalent to a finding that the sheep in question is legal and therefore his property and is passed to him. However, the Reasons for Judgment are clear in that the Judge had a reasonable doubt as to whether or not Mr. Dunn intended to kill an illegal ram and that there had possibly been shrinkage of the ram's horn. This is not equivalent to a finding of fact by the Judge that the animal was a legal ram. In fact, when making her *ultra vires* order for forfeiture, the Judge is quite clear that in her view the animal was in fact more likely than not to have been an illegal size.

Based on the evidence before me, I find on the balance of probabilities that the ram's horn was not of legal size. This is a separate issue from whether or not Mr. Dunn is guilty of a charge of killing an illegal animal and, accordingly, there is no conflict between his acquittal at provincial court and the refusal of the Wildlife Branch and this Board to return the ram's head to him.

The Board notes that the current definition is extremely difficult to apply even when the ram's head is held in a jig. These difficulties would be compounded when observing a live animal from several hundred feet away. The Board urges the Wildlife Branch to adopt a more flexible definition such as the Pope and Young categories. If an experienced and evidently meticulous hunter such as Mr. Dunn can be lead astray, the pitfalls in the current definition should be remedied.

David Perry, Panel Chair
Environmental Appeal Board

April 25, 1997