

The Rt. Hon. Lord Bonomy
2002 Act Review
Natural Resources Division
The Scottish Government
1-C North, Victoria Quay
Edinburgh
EH6 6QQ

24th March 2016

Dear Lord Bonomy,

Protection of Wild Mammals (Scotland) Act 2002

I am writing to you specifically in my capacity as Chairman of the Committee of the Duke of Buccleuch's Foxhounds ("Buccleuch") based in the Scottish Borders. I have a long involvement with the Buccleuch having been a Master both before and after the passing of the 2002 Act and therefore directly involved in interpreting the Act and the changes that we, as a mounted pack, had to institute to operate within the new law.

The Committee which is elected by the members and is governed by our Constitution (copy enclosed- appendix 2) is responsible for overseeing the affairs of the Buccleuch on behalf of its members, recommending to an annual general meeting those individuals who will act as Masters for each season and raising the necessary funds to support our activities. The Masters are responsible for running the country. They look after, breed and train the hounds, get permission from landowners, farmers and shoot managers and liaise with the police. In return they receive a sum of money to finance our activities enabling them to operate the fox control service for free.

I felt that the most useful approach that I could take to your review was to outline the steps that we at the Buccleuch (along with others) had to take to bring our fox control activities in line with the 2002 Act, the challenges we faced and overcame and a review of our experiences up to the current time.

Others will address the practical aspects of our operations but I hope that this Buccleuch Review 2002-2016 (copy enclosed- appendix 1) will help set the scene and explain the background to our activities.

Yours sincerely,

Joe Scott Plummer
Chairman of the Buccleuch

The Duke of Buccleuch's Foxhounds ("Buccleuch")

Buccleuch Review 2002 – 2016

Background

The Protection of Wild Mammals (Scotland) Act 2002 ("the Act") was passed by the Scottish Parliament on 13th February 2002 and received Royal Assent on 15th March 2002.

The Act separated what was regarded as unacceptable, namely the chasing and killing of foxes by hounds, from procedures legitimate for the control of foxes where necessary. Accordingly, traditional fox hunting in Scotland involving the chase and kill became an illegal activity and the Act established the basis for fox control using dogs to flush them from cover to be shot once it was safe to do so.

Changes under the Act

Prior to the start of the 2002/03 season (September 2002) the Buccleuch along with the other mounted foxhound packs became a gun pack and drew up plans to continue to offer landowners and farmers the fox control service that they required to protect livestock, ground nesting birds and game birds.

Firstly, the Buccleuch altered their Constitution to reflect the changes in the Law. The first clause now reads "The object of the Duke of Buccleuch's Foxhounds is to provide a fox control service to the agricultural community in the Scottish Borders to help them meet their need to protect livestock, ground-nesting birds and game birds and, to that end, to maintain a kennel to breed foxhounds in order to preserve their bloodlines, to undertake permitted hound and equestrian activities and to fund the above through subscriptions in return for mounted access to their farmland".

Secondly, the mounted foxhound packs took both legal and practitioners' advice and, in consultation with landowners and farmers, drew up their Scottish Fox Control Protocol (the "Protocol") which was first issued in September 2002 (copy enclosed – appendix 3). The wording of the Protocol was shared with and accepted by the Lothian and Borders Police and other relevant Police forces, was adopted by all of the then ten mounted foxhound

packs and became the basis of our operational commitment to everyone concerned including the general public.

From September 2002, the Buccleuch (along with others) began to operate as a gun pack within our understanding of the law as laid down in the Protocol with the full support and understanding of all concerned including the Police.

In March 2003, a complaint to the Lothian & Borders Police from a member of the public resulted in a prosecution being brought against Trevor Adams, the Joint Master and Huntsman of the Buccleuch by the Procurator Fiscal for “deliberately hunting a fox with twenty dogs contrary to section 1(1) of the PWM (Scotland) Act 2002”. The case was heard by Sheriff Kevin Drummond Q.C. in Jedburgh Sheriff Court in November/December 2004. This was the first prosecution of a mounted foxhound pack under the Act and was perceived by everyone including the Sheriff as being a test case. There was no disagreement over the facts of the case with Trevor Adams maintaining that he had operated within the terms of the Scottish Fox Control Protocol and therefore within his understanding of the Law.

After a very full statement from Sheriff Drummond (copy attached- appendix 4), all charges against Trevor Adams were dropped, no appeal against the judgement was forthcoming and a further charge against another neighbouring Master and Huntsman was dropped by the Procurator Fiscal. Furthermore it is our understanding that, having been considered at the highest levels, it was concluded that there were no grounds for an Appeal against the judgement. In his preamble, Sheriff Drummond had stressed the need to complete an exhaustive examination of all aspects of the Act and we have therefore (along with others) used his judgement as a clear precedent for our activities.

Activities since 2004

The Buccleuch has operated its fox control service on over 100 days per annum between August and March each year for the past 14 years – total of 1,400 days. In any one year, we will cross as many as 420 farms on say 2 or 3 occasions per annum with permission being granted on each occasion. Our total area of operations covers some 220,000 acres. During that time, all but a very few farmers have not made us welcome, a handful of complaints have been raised by the general public and dealt with either directly by the Police or ourselves and no charges have been brought by Police Scotland (or their

predecessors) since 2003 – and our activities take place in a totally open, public and transparent manner.

Since the Trevor Adams case, we have continued to operate within the terms of the Protocol, namely:

- Operating within the bounds of the Act
- Only with the prior permission of the farmers and landowners whose land we cross
- Having kept the Police informed of our whereabouts and operations to the extent that they have required
- With an appropriate number of experienced guns always present
- Ensuring that foxes are shot as soon as it is safe to do so
- Using assistants (whether mounted or unmounted) to turn foxes towards the guns.

Mounted followers

There are claims made by certain animal activist groups that the mounted packs are carrying on traditional foxhunting and are therefore acting illegally. They see us crossing the country on horseback and think that this aspect of the law was banned. This is not the case. To repeat, what was banned was the method by which foxes were controlled – the chase and the kill by dogs. What was not banned was the use of dogs to flush foxes from cover to guns to be shot.

The different terrain and location over which gun packs operate will dictate the number of guns used and the mode of transport chosen. Whereas large areas of forestry may require more guns, these can be deployed safely as they are in areas of low population density and mounted assistants are unnecessary; areas of hill with heather or bracken cover will require mounted followers to turn foxes towards strategically placed guns; and in the more arable areas with smaller coverts and more roads and population, fewer guns are required and safety becomes a greater issue making mounted assistance necessary. It is worth noting that about 25% of our days are carried out without mounted followers. Sheriff Drummond stated in his judgement that “the mode of transport adopted by a participant is irrelevant: it matters not that the activity is carried out on foot, by motor vehicle or on horseback”.

Certain members of the mounted field will be used for differing purposes on different occasions. However, the majority have little or no role to play in the

fox control aspects of the day. This is the responsibility of the Huntsman, Masters and their staff. Mounted members of the Hunt pay a subscription and raise money through equestrian and social events (hunter trials, point to point races, supper parties and dances etc) to cover the expenses of maintaining the hunt infrastructure and kennels, paying staff wages, feeding the hounds etc. This enables the Hunt to offer the local farmers a free fox control service in return for ridden access to their land.

The Master in charge of the mounted followers (the "Field Master" for the day) will know where the farmers will want/not want them to go and will entertain the subscribers by moving across the country jumping and galloping where they can. This activity is totally divorced from the fox control part of the business beyond moving from one area to another.

Conclusion

Other practitioners (Huntsmen and Masters) will address the more direct aspects of the Review remit and the users of our services (landowners, farmers, shoot managers) will comment on the need and effectiveness of using a full pack of hounds (as opposed to a more limited number) to flush out foxes to be shot.

In my capacity as Chairman of the Buccleuch, I thought it would be helpful to outline the background and basis on which we have carried out our activities with little or no complaints from landowners and farmers, Police Scotland or the general public over the past 14 years. This has been due to the considerable amount of expert advice sought and accepted by the Rural Affairs Committee and the Scottish Parliament prior the Act being framed and passed in 2002. It is a piece of legislation which seems to us to achieve a balance between "providing the necessary level of protection" for wild mammals whilst "allowing for their effective and humane control". In the meantime, both we and Police Scotland have a clear understanding of the law and its (penal) consequences if we break it.

Joe Scott Plummer Chairman of Duke of Buccleuch's Foxhounds
Mainhouse, Kelso, Roxburghshire, TD5 8AA

24th March 2016



DUKE OF BUCCLEUCH'S FOXHOUNDS

CONSTITUTION

Objects

The object of the Duke of Buccleuch's Foxhounds is to provide a fox control service to the agricultural community in the Scottish Borders to help them meet their need to protect livestock, ground-nesting birds and game birds and, to that end, to maintain a kennel to breed foxhounds in order to preserve their bloodlines, to undertake permitted hound and equestrian activities and to fund the above through subscriptions in return for mounted access to their farmland.

The Seasonal Year

The Hunting Year runs from 1st May to 30th April and that shall be the normal term of office for the Master(s). The Hunt Accounts shall run for the same period.

Membership

Annual General Meetings ("AGM") will be held in January. The business of the meeting shall comprise:

- (I) the consideration of the Treasurer's report and formal approval of the preceding year's accounts;
- (II) the re-engagement or appointment of the Master(s) as recommended by the Committee;
- (III) the appointment or re-election of Officers of the Committee as recommended by the Committee;
- (IV) the filling of vacancies on the Committee; and
- (V) the appointment of a reporting accountant.

Only Subscribers of a minimum of £500 may vote at General Meetings. Landowners, Tenant Farmers, Puppy Walkers and Donors are welcome to attend and address General Meetings but do not have a vote.

All Subscribers accept joint and several liability for any bank overdraft or other debts incurred by the Committee.

Any 10 Subscribers entitled to vote at General Meetings may, by signed written notice, require the Secretary to convene an Extraordinary General Meeting ("EGM") to consider and, if thought fit, approve any resolution put by them by a majority voting thereon

Any alteration in this Constitution proposed at a General Meeting must be carried by a majority of at least 75% of those voting.

The Committee

The Committee is appointed to act on behalf of all Subscribers and is responsible for the Hunt's finances.

The Committee shall consist of a Chairman, a Vice Chairman, four ordinary Members and the Chairman of the Hunt Supporters Club (ex-officio). The ordinary Member who has been longest on the Committee shall retire and is not eligible for re-appointment until one year has elapsed since he or she retired.

The Committee may co-opt up to a maximum of three Members of the Hunt onto the Committee and they will serve until the next AGM.

The Master(s) shall be invited to attend meetings of the Committee on the invitation of the Chairman.

The Committee shall be responsible for recommending the appointment of the Officers and will then seek their election at the AGM. The Officers of the Committee shall consist of a Chairman, a Vice-Chairman, an Honorary Secretary or Secretaries and an Honorary Treasurer. They shall hold office for two years but will be eligible for re-election.

Any Subscriber who has paid a minimum subscription of £500 may nominate a candidate for election to the Committee at the AGM for vacancies among the ordinary Members, provided the candidate's consent has been obtained. Such nominations shall be sent to the Chairman not later than 30th November. In the event of there being more than one nomination for a vacancy, appointment shall be made by ballot of those present and entitled to vote. In the event of there being no nominations, the Committee may nominate a candidate for election

In the event of a General Meeting not approving the Committee's recommendation(s) the following options are open:

- (I) The Committee may accept a reference back for further consideration.
- (II) The Committee should resign and a new Committee be appointed forthwith.

Meetings of the Committee may be called at any time by seven days' notice on the instruction of the Chairman, or on request by any two members of the Committee specifying the business to be discussed.

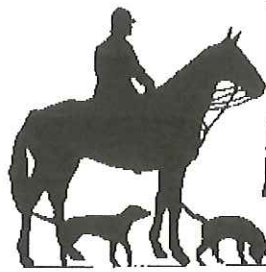
Masters

The Master(s) is/are responsible for running the country, liaising with the landowners and farmers and managing the hounds, hunt staff and the kennels. They are also responsible for the conduct of the Hunt and the discipline of the Field.

Any person appointed as a Master will become a member of the Master of Foxhounds Association ("MFHA") and both the Committee and the Master(s) agree to abide by the Scottish Mounted Foxhound Packs protocol and the MFHA rules, instructions and public relations directives.

Winding Up

In the event of the Committee deeming it appropriate to wind up the affairs of the Hunt, the Committee will call a Special General Meeting of members to discuss and determine what should happen to the assets of the Hunt. Any decision taken at the meeting will require a majority of not less than 75% of those voting.



SCOTTISH MOUNTED FOXHOUND PACKS

Original version issued September 2002
 Revised September 2004
 Revised September 2015
 Further Revised November 2015

FOX CONTROL PROTOCOL

“The Scottish Mounted Foxhound Packs will continue to offer a fox control service to farmers and landowners using hounds. This will involve the use of guns and within the bounds of the law.”

General

They will offer a fox control service to farmers and landowners operating within the bounds of the Protection of Wild Mammals (Scotland) Act 2002 (“the Act”).

They will operate only with permission from the farmers and landowners.

They will keep the Police informed of their whereabouts and operations, as requested.

They will ensure that safety issues are paramount.

Operating within the Act

They will not deliberately hunt a fox as defined within the Act.

They will use their hounds to flush out foxes from covert.

They will act to ensure that foxes are shot as soon as it is safe to do so.

They will use experienced individuals with shotguns.

They will use an appropriate number of guns dependent on terrain and location as a safety measure.

They will use assistants (either mounted or on foot) to turn foxes towards the guns, away from roads, dwellings etc and the sides of a covert where it is unsafe/difficult to shoot and for safety reasons.

They will ensure that their operations comply with one of the six purposes listed in the Act, principally

- 2 (1) (a) protecting livestock, ground nesting birds.....fowl (including wild fowl), game birds....from attack by wild mammals;
- (d) preventing the spread of disease
- (e) controlling the number of pest species; or
- (f) controlling the number of a particular species to safeguard the welfare of that species.

Operational recommendations

Farmers/Landowners

- permission to undertake fox control must be granted
- one of the six purposes should be identified, e.g. protect livestock or ground nesting birds, control of pest species

Huntsmen

- may only search for a fox in covert in order to flush to guns
- may not lay hounds on out of covert or go to a view unless he believes the fox is diseased or wounded
- may regard "covert" as meaning any natural growth in or under which a fox can hide, e.g. gorse, bracken, heather as well as woodland
- identifying dress should be considered.

Guns

- a valid shotgun certificate (and evidence of insurance) should be carried
- a minimum of two guns should be available
- shotguns preferred with No. 4 shot or less
- guns should be in radio contact with the Huntsman
- guidance to guns will be issued
- experienced guns to be used

Mounted assistants

- mounted assistants will be appointed at the discretion of the Master in charge
- they should be used to control hounds, to turn foxes towards guns, to limit the number of guns that would otherwise be required and for safety reasons, e.g. roads
- numbers of assistants will depend on location, type of country, proximity of habitation, etc.
- other spectators must be kept at a safe distance

Motorised vehicles

- owned or supplied by the Hunt, e.g. quad bikes, motorbikes
- users of such vehicles must be covered by suitable insurance
- if such vehicles are to be used on public roads, they should be equipped for road use, e.g. lights, indicators, etc
- passengers should not be allowed unless insurance cover specifically permits
- crash helmets must be made available to users of such vehicles.

Terrier work

- terriermen must be licensed by MFHA and operate under the code of the National Working Terrier Association
- a fox may be bolted to be shot
- a fox may be bolted in covert and, if unsafe to shoot, subsequently flushed from covert to be shot
- all reasonable steps must be taken to avoid injury to the terrier (1A 2(b))
- hounds must be available at all times in case of wounding.

SHERIFF KEVIN DRUMMOND QC'S JUDGEMENT.

Procurator Fiscal, Jedburgh

Against

Trevor Adams

Protection of Wild Mammals (Scotland) Act 2002

10 December 2004

Introduction:

1. I am informed that this case is the first prosecution to be brought under the Protection of Wild Mammals (Scotland) Act 2002 in the context of what is said to be "traditional" fox hunting as it was put.

I am also informed that the case is, to some extent at least, a test case where there is at least one other prosecution awaiting trial and where the view to be taken in that case may be dependent on the view taken by the court in the present case.

For these reasons I have set out a narrative summary of the material evidence which was led: commonly after a Summary trial there may be simply a brief precis by the presiding sheriff viva voce and occasionally not even that. This narrative is intended for the assistance of the parties, to explain where appropriate the approach which I have taken to the relevant facts and law and also to ensure an accurate contemporaneous record of my decision.

In the event of an appeal my formal findings-in-fact will be in significantly shorter form.

2. The basic facts of the case are not the subject of substantial dispute: what is in dispute is the construction which is to be placed upon those facts, the inferences to be drawn from them and in the final analysis whether or not they result in an offence having been committed under the Act.

3. An evidential problem emerged virtually from the opening line of the evidence in that the first witness, a police constable, said that he went to a "hunt meeting" at Gordon having been advised by the "Hunt Committee" of the meeting. The expression "hunt" or "hunting" was thereafter liberally used throughout the proceedings by the Procurator Fiscal, the solicitor for the accused and witnesses. The expression was used indiscriminately and it became clear that very different meanings were being attributed to it depending on the context.

No effort on my part to encourage the use of different terminology brought about any change in its use. It did not appear to be appreciated by all concerned despite occasional protests to the contrary that the activity which is created as an offence by the Act is the activity of "hunting" and whether or not that activity took place is a matter of fact which requires to be proved by the Crown. Accordingly where I have recorded witnesses as using these terms it should be read against that background.

4. It should be borne in mind that this is a penal statute creating offences punishable by imprisonment and it falls to be construed in no different way from any other penal statute. There is no burden of proof on an accused person and it is not for an accused to prove that he falls within a statutory exception. It is for the Crown to prove his guilt beyond reasonable doubt and to exclude the application of any such statutory exception.

The Charge:

5. The accused Trevor Adams is charged that "On 16th October 2002 at Courthill, Kelso he did deliberately hunt a fox with twenty dogs contrary to Section 1(1) of the Protection of Wild Mammals (Scotland) Act 2002."

6. Section 1(1) is in the following terms:-

" A person who deliberately hunts a wild mammal with a dog commits an offence."

Section 10(1) provides that "to hunt" includes to search for.

Section 10(1) also provides that "references to hunting with..."a dog" are to be interpreted as also applying to hunting with.....two or more dogs."

7. Section 2 of the Act is headed: "Exception: stalking and flushing from cover" and goes on to describe activities which constitute exceptions from the offence created by Section 1(1) .

The section goes on to provide that " "a person whohas the permission of...the owner of the land on which the stalking, searching or flushing referred to in this section takes place does not commit an offence under Section 1(1) " in certain circumstances.

I pause to observe that despite the reference to the stalking searching or flushing "referred to in this subsection " there is in fact no other reference whatever to "searching " within the subsection: bearing in mind that hunting although not itself defined in the Act is declared by Section 10(1) to include searching, the closest I came to obtaining assistance in construing this part of Section 2(1) was a suggestion by the Procurator Fiscal that searching " had been included " by mistake."

8. The section continues that such a person does not commit an offence

- (i) by using a dog (or two or more dogs)
- (ii) under control
- (iii) to stalk a wild mammal
- (iv) or flush it from cover... above ground

for six specified purposes of which of relevance to the present proceedings, are purpose(a) protecting game birds and purpose(e) controlling the number of a pest species, but only if that person “ acts to ensure thatonce the...mammal...emerges from cover...it is shot, or killed by a bird of prey once it is safe to do so.”

Being “shot “ and killed are not synonymous.

In terms of Section 10(1) “pest species “ includes a fox.

For convenience at this juncture I record that in respect of certain expressions used in the Act but for which no statutory definition is provided I applied the following meanings which I understood to be ordinary meanings of the relevant words for the purpose of this Act.

Stalking: pursuing game or a quarry by stealth.

Searching: going about in order to find or ascertain the presence of a thing.

Flush: to drive out into the open

Hunt: The contention on behalf of the Procurator Fiscal was that the word “hunt” means “to pursue and kill for sport or food” although as part of the same submission it was said that it was not necessary that a wild animal actually be located let alone pursued or killed. I accepted that part of the submission that it was not necessary that any animal be located or killed for hunting to take place: but neither do I consider that to carry out the activity for sport or food is necessarily a characteristic of hunting. In this connection I should point out that one of the excepted purposes, namely, Section 2(1)(b) is the providing of food for consumption by a living creature including a person. The expression “for sport or food “ seems to me to be no more than purposes or motivations for the activity and there may be many such motivations e.g for exercise, for financial gain or for photography or the like.

What is made criminal is the act of hunting when done with dogs except for those purposes and in those terms which are permitted by the statute.

It was said in evidence by the accused that he did not accept a definition to the above effect when it was put to him by the Procurator Fiscal: the accused said that that was American. He said that the English definition of hunting meant “hunting with hounds.” No such submission was made eventually on his behalf and I in any event I did not accept it: I consider that to be a restricted meaning .

If Parliament had intended a special meaning to be given to the word it could have done so. The word should be given its ordinary meaning which I consider to be "diligent pursuit."

I accordingly consider that the activity which is struck at by the Act is the diligent pursuit of a wild mammal with dogs and in terms of Section 10(1) that includes "searching."

I should also add that the mode of transport adopted by a participant is irrelevant: it matters not that the activity is carried out on foot, by motor vehicle or on horseback.

The Evidence:

The narrative which I accept to the extent which it represents questions of fact is as follows:-

9. On 16th October 2002 the accused organised a meeting of some twenty horse riders, accompanied by a pack of twenty foxhounds and two other males who were carrying firearms and were travelling on quad bikes or the like.

In advance of the activity which had been planned to take place that day the accused had either by himself or through others obtained the consent of landowners over whose land the activity was to take place. He had also informed the police in advance of the proposed activity. He identified himself to a police officer who attended at an assembly point prior to its commencement as being in charge of the activity.

10. The group assembled at Mellerstain Mill near Gordon and set out across farmland between Spotsmain and Nenthorn.

They came eventually to a location known as Little Thain where there is a deep gully through which the Eden Water flows and which has on its steep bankings a number of extensive thickets of gorse or whin.

On three or four separate occasions the two members of the party with firearms took up positions in advance of the rest of the group. The accused and one Lucy Robertson who were both on horseback took up a position near the bottom of the gully.

11. On each of these occasions the pack of hounds was set into the gorse or whin for the purpose of flushing a fox from cover. The remainder of the group on horseback maintained a position at the top of the bank behind the accused and Lucy Robertson for the purpose of encouraging any fox flushed from cover to proceed in the direction of the guns in order that it might be shot.

On each of these occasions no fox was flushed from cover.

12. The party came eventually to a location where the gully opens into open fields: at this point the two guns were again placed at a position in the open fields which afforded them a 360* arc of fire for the purpose of shooting any fox which emerged from cover.

The same procedure was followed as before and on this occasion a fox was flushed from cover in the direction of the guns with the hounds in pursuit.

13. The fox broke from cover out of range of the guns and headed towards a plantation and eventually in a southward direction towards Courthill Farm. I accepted the evidence which was to the foregoing effect. There was no contradictory evidence in relation to the foregoing activity.

14. Mr. Ian Hutcheson and his wife Sandra are the occupiers of Courthill Farm.

They are tenant farmers the owner being Roxburgh Estates.

Mr. Hutcheson had at some time in the past participated in foxhunting. It was well known that he was now opposed to foxhunting considering it to be outdated on cultivated land.

He had tried to stop the Hunt entering his land the previous year but had been informed that it was a condition of his lease that the Hunt should be allowed to enter Courthill Farm.

In advance of 16 October 2002 he had been informed that the foregoing activity would be taking place on adjoining land and he was asked if he required a fox control service on Courthill. He declined.

Some time in the course of the morning he was working around the farm buildings at Courthill: he heard the sound of hounds. He could not see the hounds.

15. The sound which he heard was what he considered to be the sound of hounds in full cry. He was going to take out a gun and shoot a hound but he was persuaded not to do so by his wife.

After a short lapse of time he and his wife travelled from Courthill farm along a track in the direction of the sound which they had heard.

Whilst travelling on the track (and still within Courthill Farm) in their four wheel drive vehicle, hounds were crossing in front of the vehicle coming from the direction of a wood.

16. These hounds were on land which was part of Courthill Farm. The hounds which he then saw were not on a scent: they were following the scent of the other hounds. They were not going full tilt: he could not hear

their cry: he could not hear the sound of any hunting horn by reason of the noise of his vehicle.

The hounds crossed a field and headed in the direction of a further plantation beyond Courthill Farm. Mr. Hutcheson reached a point from which he was able to see a group of horse riders who were stationary near a ford at the Eden Water. They were not on Courthill Farm.

He did not see any persons with guns: the hounds which were coming across Courthill he described as stragglers. There were two or three people on horseback close to the plantation in the direction of which the hounds had gone : they were calling the hounds back in and gathering them together.

17. He said that the hounds know what they are doing. They can be stopped but it takes "a fair bit of doing." The hounds were acting in an instinctive fashion.

Mr. Hutcheson telephoned the police because he believed that hunting was banned in Scotland.

He did not know the horn sound for recall of the hounds. The sound of the horn can carry some distance.

Mrs Hutcheson gave evidence to a similar effect.

I accepted the evidence of Mr.& Mrs Hutcheson of the facts which they observed.

18. A Mr. Robin Thomson who lived on Nenthorn Estate was in his garden and heard the dogs at around the same time that Mr. Hutcheson heard them. He could not see the dogs but could identify the direction from which the sound was coming. He drove in that direction and saw hounds travelling in a direction which would be consistent with them crossing Mr. Hutcheson's property. At first he saw no horse riders but later saw a group of horse riders stationary near Eden Water ford which was again consistent with what was seen by Mr. Hutcheson.

19. Mr. Thomson had heard the sound of a hunting horn while he was in his garden. The hounds were significantly closer to the sound of the horn than was Mr. Thomson. He knew that a huntsman can be some distance from a well trained pack and be thoroughly in control.

He saw no guns: he saw no fox. The dogs which he saw did not appear to be enthusiastically in any pursuit of anything. They were not, as he described it, focussed. They were just moving in the same general direction.

20. I infer that the sound of the hounds which Mr. Hutcheson and Mr. Thomson heard was the sound of the hounds when they flushed the fox from the end of the gulley as described earlier.

I infer that the sound of the horn which Mr. Thomson heard was the accused sounding his horn after the fox had broken through the guns.

21. Mr. Thomson some short time later saw the hounds being gathered together and head off in another direction which was likewise consistent with what was seen by Mr. Hutcheson.

I accepted Mr. Thomson's evidence of the facts which he observed.

22. Sgt. Bell of Lothian & Border Constabulary received a complaint in connection with the activities described above. On 31 Jan 2003 the accused attended at a police office by arrangement and under caution provided a statement in answer to questions to the following effect:-

The hounds followed the route referred to in the evidence

He was about 300 yards from the hounds

The hounds were "hunting the scent of a fox" : he did not wish to enter Mr. Hutcheson's land lest he damaged any crops : his route to stop the hounds accordingly gave rise to a delay: he denied in terms "intentionally chasing a fox with hounds."

The events (giving rise to the complaint) happened in less than 5 minutes.

He was asked what was the reason for the hunt that day and in response said that there were two reasons viz (1) controlling the pest species and (2) protecting livestock namely ground nesting birds and game birds.

He was asked what steps he took to ensure that the fox was shot as soon as possible after it was flushed and replied by having the guns in close proximity to where he thought the fox would flush to.

He confirmed generally other details of the events that day.

The Crown Case was closed with the foregoing evidence.

23. The accused gave evidence.

The accused is a Master of Foxhounds. He was in charge of the activities which took place on 16 October 2002.

He was aware of the new legislation and believed that it was lawful to flush foxes to guns.

What was described as "a protocol " was put together and a new Pest Control Service was offered to landowners: the content of the protocol was made known to the police in Hawick.

24. On 16 October 2002 they were invited on to land for the purpose of killing foxes to protect the landowner's pheasants.

He did not have the occupiers permission to go on to Courthill farm

The two persons in the party carrying firearms were very experienced firearms users.

The activity which took place in an unsuccessful effort to flush foxes was as described at paras. No. 10 and 11 above.

When they reached the area where the fox was flushed some of the mounted followers were positioned to flush the fox to the guns.

25. A fox was driven in the direction of the guns.

From his location in the gully the guns were not within his sight.

After a short lapse of time there was no sound of gunfire and it was evident that the fox had got beyond the guns.

26. He set out on horseback to stop the hounds. He was sounding his horn to recall the hounds. There is a particular call which is used to stop the hounds. That is the call he was sounding.

The hounds had gone onto Courthill Farm. He did not wish to go onto the farm ground and followed an identified route for the purpose of ingathering the hounds. He eventually gathered the hounds together and set off in the direction of Spotsmains farm.

The purpose of the activity was to flush foxes in order that they could be shot.

27. The addition of guns has made a significant change to the way in which foxhunting was formerly carried out: changes have been made to the pack of hounds by the disposal of dog hounds to packs in England. Female hounds had been retained which were more biddable.

Changes had also been made in the way in which hunt followers on horseback are used. Formerly they would have been held back from where the flushing takes place: now they are used as assistants to flush the fox towards the guns: formerly the fox could break in any direction.

The hounds themselves are still bred and trained to what was referred to as the old fashioned manner: as the situation develops they will become more used to the new practice.

28. The hounds are in pursuit of the fox as it is flushed towards the guns: there is a risk that a hound could be shot but the fox gains ground on the hounds quite quickly.

The guns are positioned outside the cover from which the fox is flushed and are intended to be in a position to shoot the fox safely.

Once the fox gets past the guns it is free. At that stage the witness is in contact with the guns by two way radio. The radios in use on 16 October were ineffective at that moment by reason of the terrain. They now use more effective radios.

29. The dogs were not out of control. The accused could direct them by audible command and that is what he was doing. The hounds were doing what they are trained to do.

At no time was he deliberately hunting a fox.

The dogs stopped hunting the fox as soon as they heard the audible command.

There was no fox caught.

He was calling in the dogs from the time the fox went through the guns.

There was no intention to go on to Courthill. He did not accept a definition of hunting as "pursuing a wild mammal for sport or food." That is an American definition: the English definition is always with the use of hounds.

30. It was suggested to the accused that the activity of Pest Control has simply been a rebranding of the previous activity of foxhunting and that he is choosing words to mask what he is doing, as it was put. He still uses hounds and still goes out on horseback. : the rebranding is simply paying lip service to the legislation : if not shot by the guns he knew perfectly well that hounds would chase the fox.

The accused did not agree with any of these propositions. The suggestions put to him beggared belief: the legislation was new and to set out to break the law two fields from a farm which was ant-hunting did not make sense.

31. In answer to a question from the court the accused said that there are approximately eight commands given by the hunting horn. Some of these are intended for riders. The calls to the dogs are not like commands to shooting dogs or sheep dogs. They are more guidance than direct commands.

32. Lucy Robertson gave evidence to the same effect as the accused in respect of the events up until the fox was flushed from cover. She said that as soon as they got out of the valley the accused was sounding his horn to recall the dogs.

33. Mr. Peter Neilson, a Horse Whisperer by occupation, was the Joint Master of the Buccleuch Foxhounds and was present on 16th October. The plan for the day was to drive foxes at Eden Water towards the guns. The guns were put out on several occasions as they went down the valley. He described the fox being flushed from cover which went into a field where there was a gun standing, the fox saw the gun, took evasive action and headed into a wood behind the gun. Courthill Farm did not want them on the ground and the activity was probably going to stop at Nenthorn (which was effectively the point at which the fox was flushed from cover.)

34. He took part in the stopping of the hounds. He was closely involved in the planning of the day. They had telephoned Courthill Farm out of courtesy : they are not functioning as a hunt any more but as a fox control service.

35. The final witness was Mr. William Armit. He is an 81 year old retired farmer. He was an experienced huntsman with hounds but was taking no part in the day's proceedings either as a participant or spectator. As I understood it he was simply out standing in his field. He was on nearby farm land and identified the field where he had been standing when he heard the sound of a hunting horn. He was some significant distance from the point where the hounds were gathered in.

He was familiar with the commands given by the horn. The horn which he heard was sounding "stop." He heard the call change to "recall." The hounds responded and did come back. He thought that the control was very good. He was also able to describe the activities of the hounds from the sounds which the pack was making.

He was approximately 400 yards from the horsemen and was out of sight of them when he heard the horn.

(This witness was a little deaf and required to adjust his hearing aid in court: the significance of that fact being that he, out of sight of the horsemen and at a distance of some 400 yards was able (a) to hear the horn and (b) identify the commands.)

The defence case was closed with the foregoing evidence.

The Submissions:

36. The Procurator Fiscal produced his submissions in writing. Copies were provided for the press and a number of members of the public who were in court. In the interests of brevity I do not repeat them here. They are attached hereto.

In relation first to the Crown's summary of the facts, the only material submission which I did not accept was at the third paragraph on page 2 to the effect that when the hounds were seen by Mr. Hutcheson they were not "*under control in the common sense of the term and indeed within the definition of the Act*" as it is put. That was not in accordance with evidence to the contrary which I accepted nor in accordance with the definition of "under control" in the Act as I have understood it.

37. It is part of the Crown submission that the provisions contained in Section 2 amount to what is described as a set of rules compliance with which provide exemption from the offence created by Section 1. While I recognise that that might be a convenient shorthand form of approaching this matter it should not be forgotten that this is a penal statute and there is no burden of proof on an accused : it will always be for the Crown to prove that the offence has been committed and that the statutory defence provided has been excluded.

38. Turning to the Crown submission in relation to the application of Section 2 to the case, these are helpfully summarised in the written submission and address what are identified as the requirements for the application of the Exception in Section 2 in the case before me as follows:-

1. Permission to be on the ground : probably satisfied
2. Dogs under control : not satisfied
3. "Stalking or flushing": not satisfied. They were hunting

4. Purpose of the hunt: accused's position not challenged.
5. Acting to ensure the fox was shot : not satisfied

39. The Crown further submit that the activity of the hounds, as opposed to the person, was that of hunting: in this context it is further submitted that "the exception only applies when the dogs are "stalking or flushing." That of course, as I have already pointed out is to ignore the word "searching" in the section: this same matter is raised later in the submission where the word "search" is described by the Crown as being "bundled together with stalk and flush and is clearly regarded as being synonymous with hunting."

I found some difficulty with this aspect of the Crown submission which I suspect finds its source in the view expressed that the word "search" had found its way into the subsection "by mistake." I did not accept this submission.

40. On behalf of the accused Mr. Harley submitted that most of the evidence of fact is agreed.

It was said that the Crown concede that everything which was done up until the fox went through the guns was lawful. Permissions had been obtained, the guns were set in place to shoot the fox: the genuine intention of those carrying out the service was to shoot the fox when flushed.

It was submitted that I should conclude that the accused was deliberately flushing a fox from cover to have it shot. Experienced shooters were present for that purpose.

It was said that if the intent to shoot was a sham then the offence was committed. If the intent was genuine then no crime was committed even if the fox was killed by the hounds which did not happen.

Examples of situations such as a shot or shots missing the fox; the fox being wounded; the fox being caught and killed by the hounds before it reaches the guns were referred to and were all said to be within the contemplation of what was said to be the scheme of the legislation. This was said to be demonstrated by the terms of Section 2(2) which provides that where a person is using a dog in connection with the despatch of a (fox) with the intention of flushing it from cover in order that it may be shot or killed by lawful means that person does not commit an offence under Section 1(1) by virtue of the dog killing (the fox) in the course of that activity.

41. There is nothing in Section 2(2) which places any time limit on when the dog might kill (the fox). This is a single continuing activity. The hounds in chasing the fox are linked to that activity and there is no reason why, even if the hounds had caught and killed a fox which did not happen, the benefit of the exception should be lost.

42. It was further submitted that everything which was done between the fox evading the guns and the hounds being ingathered fell within the exceptions on

the basis that everything done prior to that was lawful and the evidence from that point onwards was all to the effect that the accused was stopping the hounds.

43. It was further submitted that the evidence shows that the hunting horn was used continuously until the hounds were ingathered and that the accused "was able" to order the dogs activity by audible command. It was said that Parliament has indicated by the terms of this legislation that the shooting of foxes is promoted and the accused had taken care to comply.

There was no deliberate hunting of a (fox) with dogs.

The question was posed of what more could the accused have done and reference was made to his level of co-operation with the police both before and after the events of 16th October.

Decision :

44. On 16th October 2002 the accused was deliberately searching for a fox with dogs. In terms of Section 10 (1) "hunting" includes searching. The only place where an offence is alleged to have been committed that day was on Courthill farm. Activities up to the point where the dogs entered Courthill farm is not libelled as an offence nor was it so suggested in evidence or in submissions before me.

The accused had permission to be on the ground where the activity was taking place. His intention in searching for a fox was in order that it might be flushed from cover above ground in order that it might be shot.

45. The purpose of the activity which was taking place was for the protection of pheasants from attack by foxes. Pheasants are game birds. A second purpose was for the controlling of the number of a pest species, namely, foxes. He was using dogs for this activity. In the circumstances as they emerged before me it was an issue of fact and law as to whether or not the dogs were "under control" as is required by Section 2(1) and as is defined by the Act.

46. In terms of Section 10(4) "a dog is under control if –

- (a) the person responsible for the dog is able to direct the dog's activity by physical contact or verbal or audible command.

I am satisfied that the accused was at all material times able to direct the dog's activity by audible command, namely a horn: that he did in fact give audible commands for the purpose of directing the dogs activity. The dogs did in fact respond to the audible commands.

The accused had also had the dogs under sufficient control as to be able to carry out a number of distinct searches using the dogs prior to the final exercise when the fox was flushed.

Section 10 (4) provides an alternative definition of "under control", namely-

- (b) "the dog is carrying out a series of actions appropriate to the activity undertaken having been trained to do so."

The dogs in question were foxhounds bred for the specific activity of hunting foxes. Part of the activity of hunting foxes includes searching for them and flushing them from cover. The activity being undertaken on 16th October was the activity of flushing foxes from cover. The actions or series of actions described by witnesses including Mr. Hutcheson was that the dogs were acting instinctively or in accordance with their training. They were carrying out a series of actions appropriate to the activity undertaken, namely, flushing foxes from cover above ground.

Had it been necessary for me to do so I would also have found that the dogs were under control as defined by section 10(b).

47. I reject that part of the Crown submission on this matter which proceeds on the basis of the evidence of Mr. & Mrs Hutcheson who said there were no audible commands of any type heard which indicated that any person was in a position to fulfil that part of the requirement. In fairness there were audible commands spoken to by Mr. Thomson, Mr. Armitt, Ms. Robertson and the accused. Mr & Mrs Thomson appear to be the only witnesses who did not hear them and conceded that they may not have done so by reason of the noise of their vehicle.

48. In terms of Section 2(1) a person does not commit an offence under Section 1(1) if he meets the other criteria set down in that section and

“only if that person acts to ensure that once the target wild animal is found or emerges from cover (in this case the fox) it is shotonce it is safe to do so.”

The acting to ensure that it is shot is qualified by the expression “once it is safe to do so.” Whether or not it is safe to do so at any particular moment in time will be a question of fact to be determined in each case.

The only evidence which I heard on the question of the shooting or non-shooting of the fox was that at the material time when it was flushed from cover above ground it acted in such a way as to be out of range of the guns.

The accused had acted to ensure that it would be shot by placing the guns in a position where that could be done: the fact that it was not shot does not mean that the action was not taken.

I did not accept the Crown submission on this matter. As I understood it the Crown position became that if the fox was not shot that meant that the accused had not “acted to ensure that it is shot” and accordingly the benefit of the exception in section 2(1) could not be prayed in aid, that the activity being undertaken thereby ceased to be an excepted activity and became the deliberate hunting of a fox with dogs contrary to Section 1 (1). In the first instance in my opinion, that submission ignores the qualification of “once it is safe to do so”

and effectively inverts the burden of proof. It will always be for the Crown to establish that an accused person deliberately hunted a wild mammal with dogs.

49. The accused was accordingly on land with permission which was not an issue in dispute: his purpose on being there is not challenged by the Crown and is accepted as falling within the excepted purposes. I have found that he was searching for foxes for the purpose of flushing them from cover in order that they might be shot. He acted to ensure that that was done. I have found that the dogs were under control at the material time.

The accused's activity accordingly falls within the terms of Section 2(2) and he is not guilty of the offence under section 1(1).

50. In the light of one or two of the broad areas of dispute and the fact that the present case is being treated as a test case it appears to me that it might be appropriate if I were to make an observation on the general scheme of the Act: some brief reference was made to that in the course of submissions. I do so without having read or taken into consideration any debates of which this Act is the product.

I look only at the law as it is enacted by the legislature and I attempt to give effect to the intention of Parliament as it is reflected in the words of the statute.

51. It is an Act which is designed to protect wild mammals from being hunted with dogs.

In order to give effect to that intention the Act creates in section 1 the straightforward offence of deliberately hunting a wild mammal with a dog or dogs.

That is the only offence which is created by the Act.

The Act contains 12 Sections: two of those are wholly administrative.

Ten contain substantive provisions of which four, namely, sections 7,8,9 and 10 deal respectively with powers of search, penalties and interpretation.

Section 1 creates the offence and of the remaining five Sections namely Sections 2,3,4,5, and 6 all are headed "Exception" and of those five, four make reference to the use of a dog or dogs in carrying out the particular activity which is there excepted from criminal liability.

52. Two provisions, namely, Sections 2 (2) and 5(3) provide for situations where the target species might be killed by a dog in the course of the excepted activity and some brief reference was made to Section 2(2) in the submissions before me.

It appears to me that those two provisions are designed to address further exceptional, and in one sense, accidental consequences, of actions arising during an excepted activity. They plainly, in my opinion, do not provide broad exceptions to the general scheme which could be used as a justification for the intentional killing of a target species with a dog or dogs.

The clear intention of Parliament as expressed in the Act is the humane despatch of target or pest species by shooting.

53. It appears to me, therefore, that while Parliament in terms of the Act has recognised that there is certain limited and defined scope for the legitimate use of dogs in activities which are specified in each of the Sections which I have mentioned, namely and broadly speaking, stalking searching and flushing, that activity will require to be accompanied by realistic and one would expect, effective arrangements for the shooting of pest species. The use of what might be termed "token guns" or what was described by the Crown as paying lip service to the legislation is not available by virtue of sections 2(2) or 5(3) as a justification for the continuation of what was referred to in the evidence before me as traditional foxhunting.

I have numbered paragraphs purely for convenience of reference.