Province of British Columbia

Environmental Appeal Board

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APPEAL NO. 99-WIL-08 and 98-WIL-23(a)

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

BETWEEN:	David Beranek	**APPELLANT**
AND:	Regional Enforcement Manager	**RESPONDENT**
AND:	Regional Fish, Wildlife and Habitat Manager	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board	
	Toby Vigod, Chair	
DATE OF HEARING:	Conducted by way of written submissions concluding April 21, 1999	
APPEARING:	For the Appellant: Glen A. Purdy, Counsel	
	For the Respondent: Richard Daloise	

PRELIMINARY ISSUES

On March 10, 1999, David Beranek appealed the February 19, 1999 decision of Richard Daloise, Regional Enforcement Manager, Kootenay Region, regarding the transport of the horns and cape of a dead bighorn sheep. The appeal was to be conducted by way of written submissions.

Prior to setting down a schedule for the exchange of written submissions, the Board received a letter from the Respondent, Mr. Daloise, challenging the Board's jurisdiction to hear the appeal. In his letter dated April 1, 1999, Mr. Daloise advised the Board that his decision was not based on any statutory authority and, therefore, could not be appealed to the Board.

A separate issue was raised by the Regional Fish, Wildlife and Habitat Manager for the Kootenay Region, Rick Morley. Mr. Morley asked the Board to reopen a previous appeal launched by Mr. Beranek in 1998 regarding the horns and cape of the same bighorn sheep. A decision on that appeal had been rendered on October 5, 1998 (see *David Beranek* v. *Regional Wildlife Manager*, Environmental Appeal Board, Appeal No. 98-WIL-23 (unreported)).

The Board sought written submissions from the parties on both the jurisdictional question and Mr. Morley's application to reopen the previous appeal. Although the issues relate to different appeals, the Board has addressed them both in this decision since the factual matrix of the issues overlap.

The authority for the Environmental Appeal Board to hear these matters is found in section 11 of the *Environment Management Act*, and section 101.1 of the *Wildlife Act.*

BACKGROUND

On February 3, 1998, Mr. Beranek collected a set of horns from the carcass of a mountain sheep that he had found near the Fording River in Elk Valley, B.C. At the time of the find, Mr. Beranek was working as an employee of Line Creek Coal Company, carrying out a government-approved sheep population survey for that company's bighorn research program. The survey was being conducted by helicopter, and Mr. Beranek transported the horns in that helicopter.

On February 4, 1998, Mr. Beranek presented the horns to the local Conservation Officer, Frank de Boon. Mr. de Boon advised Mr. Beranek that if he wished to keep the horns for himself, he must apply to the Regional Manager for a possession permit.

The following day, February 5, 1998, Mr. Beranek wrote to Mr. Morley, Regional Fish, Wildlife and Habitat Manager, requesting a permit to keep the horns "for a personal display."

By letter dated May 8, 1998, Mr. Morley denied Mr. Beranek's permit application. Mr. Beranek appealed Mr. Morley's decision to the Environmental Appeal Board.

On October 5, 1998, the Board allowed Mr. Beranek's appeal, and ordered that he be granted a permit to possess the horns, subject to the condition that he not sell them for profit.

On October 15, 1998, Mr. Morley wrote to Mr. Beranek advising him that he wished to delay the issuance of a possession permit because the Conservation Officer Service was investigating the matter.

On February 19, 1999, Mr. Daloise wrote to Mr. Beranek. As this letter is the subject of Mr. Beranek's current appeal and its contents go to the jurisdictional issue currently being considered, the letter is reproduced in full below:

> On February 3, 1998, while conducting a wildlife survey in conjunction with the Columbia Basin Fish and Wildlife Compensation program you and helicopter pilot Monty Oatman picked up the horns and cape of a dead bighorn sheep in the vicinity of Dry Creek.
>
> You have attempted to obtain a permit for this sheep for personal possession. However the incident has been investigated by Pat Holder, Conservation Officer Fernie. Officer Holder's investigation indicates that this animal was picked up with the use of a helicopter and this action is in violation of section 27(1)(b) Wildlife Act.
>
> I have reviewed Officer Holder's investigation report and concur that the facts of the matter indicate that the sheep was picked up in violation of the Act. Officer Holder has decided that a written warning is an appropriate enforcement action in this case and I concur with his

> decision. Therefore I have enclosed Warning Notice number 24697, warning you of your offence under section 27(1)(b), Wildlife Act.
>
> You should note that section 2 Wildlife Act vests ownership of all wildlife in the Crown … and further you should note that section 2.2 of the Permit regulations provide that a permit to possess wildlife can not be given where the applicant took that wildlife in violation of the Act. Therefore the ministry shall retain ownership of this sheep horns and cape and shall dispose of them in accordance with our policy.
>
> …

As it appears that the February 3rd Warning Notice mistakenly cited 27(1)(b), which addresses the killing of wildlife from a motor vehicle or a boat, a new Warning Notice was issued to Mr. Beranek on March 1, 1999, by the Conservation Officer. The new Notice cites section 27(2)(b) of the *Act*, which does address the use of a helicopter for transporting game. It states:

> **27** (2) A person commits an offence if the person
>
> (a) hunts wildlife from an aircraft, or
>
> (b) uses a helicopter for the purposes of transporting hunters or game, or while on a hunting expedition, except as authorized by regulation.

On March 10, 1999, Mr. Beranek filed an appeal of Mr. Daloise's decision. In his Notice of Appeal, Mr. Beranek states that section 27(2)(b) has no applicability to his case, that the Regional Wildlife Manager had ample opportunity to raise this issue before the Environmental Appeal Board in the previous appeal and failed to do so, and that Mr. Daloise's decision is an "attempt to circumvent the decision of the Environmental Appeal Board." He maintains that Mr. Daloise's decision is a new decision and is, therefore, appealable to the Board.

The Board decided to conduct the appeal in writing and set down timelines for the exchange of written submissions. It was during the course of the written submissions that the two issues currently before the Board were raised.

ISSUES

1. Whether the Regional Enforcement Manager's decision is an appealable decision under section 101.1 of the *Act.*

2. Whether the Board may reopen Mr. Beranek's appeal against the May 8, 1998 decision to deny him a permit to possess the sheep horns.

RELEVANT LEGISLATION AND POLICIES

Section 101 of the *Wildlife Act* states as follows:

> **101** (1) The regional manager or the director, as applicable, must give written reasons for a decision that affects

(a) a licence, permit, registration of a trapline or guide outfitter's certificate held by a person, or

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

(2) Notice of a decision referred to in subsection (1) must be given to the affected person.

Appeals to the Board are authorized by section 101.1 which provides that:

101.1(1) The affected person referred to in section 101(2) may appeal the decision to the Environmental Appeal Board established under the Environment Management Act.

DISCUSSION AND ANALYSIS

1. Whether the Regional Enforcement Manager's decision is an appealable decision under section 101.1 of the *Act*.

Mr. Daloise submits that his decision of February 19, 1999 was not a decision made under the *Act*. He submits that he was simply concurring with a decision of the Conservation Officer to issue a warning to Mr. Beranek. Mr. Daloise submits that the Conservation Officer's issuance of the warning, and Mr. Daloise's agreement with that course of action, are not statutory decisions that may be appealed to the Board.

Mr. Beranek argues that the Regional Enforcement Manager's decision is a decision affecting an application by a person for a permit and, therefore, it is an appealable decision pursuant to the *Wildlife Act*. He states it is not the decision to issue the Warning Notice that is the subject of the appeal, it is Mr. Daloise's decision that a permit will not be issued to Mr. Beranek that is being appealed. Mr. Beranek submits that, since Mr. Daloise has admitted that he had no jurisdiction to make that decision, the appeal must be allowed.

Mr. Morley did not provide any submissions on this issue.

As noted above, section 101.1 of the *Act* authorizes a person affected by a decision under section 101(2) to appeal to the Board. Section 101(2) refers to decisions made by a regional manager or director. Regional manager is defined in section 1 of the *Act* as "a regional manager of the recreational fisheries and wildlife programs."

Mr. Daloise is not a director, nor is he a regional manager of the fisheries and wildlife program. He is the Regional Enforcement Manager, or regional head of the Conservation Officer Service, in the Kootenay Region. His title and role is distinct from that of the Regional Fish and Wildlife Manager. Further, there is no evidence that Mr. Daloise is "a person authorized by the regional manager" to have authority over the granting of permits. In the Kootenay Region, Mr. Morley is the Regional Manager, and it was Mr. Morley who made the initial decision in 1998 to refuse a permit to Mr. Beranek.

While Mr. Daloise noted in his February 19, 1999 letter, that Mr. Beranek would not be able to obtain a permit to possess because there had been a violation of the *Act*,

this cannot be construed as a refusal to grant a permit. As the Regional Enforcement Manager, Mr. Daloise has no authority to issue or refuse such permits – section 19 of the *Act* limits that authority to regional managers as defined in the *Act*. In spite of the fact that he refers to the permit issue, it is clear from his letter that Mr. Daloise was dealing with an enforcement issue, a matter clearly within his mandate, not a permit issue.

As a tribunal created by statute, the Board only has the jurisdiction given to it by its enabling statutes: in this case, the *Wildlife Act*. As section 101.1 limits the Board's jurisdiction to hearing appeals from decisions made by a director or regional manager, the Panel finds that it has no jurisdiction over this matter. Mr. Daloise was not a regional manager or director under the *Act*, he had no authority to make decisions regarding the granting of permits, and his February 19, 1999 letter did not make any decision with respect to the possession permit. Accordingly, the February 19, 1999 decision is not appealable to the Board.

The Panel now turns to consider whether the hearing of the previous appeal should be reopened.

2. Whether the Board may reopen Mr. Beranek's appeal against the May 8, 1998 decision to deny him a permit to possess the sheep horns.

In its May 8, 1998 decision, the Board considered the reasons given by the Regional Manager, Mr. Morley, for refusing to issue a possession permit. His reasons were:

1. You were participating in a government approved sheep survey which provided you with the opportunity to find this sheep.

2. It is not appropriate to establish the precedent that those participating in wildlife surveys will be rewarded by being able to profit from the opportunity to collect wildlife parts.

3. It appears the sheep survey was interrupted in order to land [from a helicopter] to allow you to collect these horns.

4. The collection of these horns by a Line Creek employee is not appropriate.

Mr. Morley presented the Board with two additional reasons to deny Mr. Beranek's permit request. First, Mr. Morley questions the legitimacy of the find:

> … I attach a conservation officer occurrence report which does not indicate whether this ram was judged to be illegally killed or not. Since the conservation officers did not visit the carcass site this judgement wasn't possible. The ram could have been illegally killed and according to Procedure volume 4, section 7, subsection 12.04.01, page 2, 'permits are only issued to persons where the regional manager is satisfied there is not illegal activity associated with the acquisition of the horns,' I have no method to make a judgement in this regard.

Mr. Morley's final reason to disallow the permit was the simple monetary value of the horns, which he estimated to be over $3200.

The Board dismissed each of Mr. Morley's reasons as not constituting proper grounds for refusing Mr. Beranek a permit. Regarding the concern about illegality, the Board specifically recognized that the illegal poaching of wildlife is a serious concern, then stated:

> In this case, however, there are no grounds on which to suspect any illegal activity associated with the find. The evidence supports Mr. Beranek's explanation that he found a *dead* animal while undertaking an aerial sheep survey. Neither does the Conservation Officer's report arouse any suspicion of foul play. The report 'does not indicate whether this ram was judged to be illegally killed or not.' However, the Board can infer that the Conservation Officer had an opportunity to view the head and horns stored in the freezer and if illegal killing had been a consideration he would have addressed that possibility in his report.

The Board then concluded that Mr. Morley submitted "no good reason to deny Mr. Beranek a possession permit for the horns he recovered." It found that Mr. Beranek had acted in good faith and followed proper procedure in immediately turning the horns over to the Conservation Officer and requesting a possession permit. The Board found that Mr. Beranek should be granted a permit to possess the horns on the condition that the horns not be sold for profit.

Mr. Morley, now asks the Board to reopen the first appeal and reconsider its decision based on new evidence. The new evidence came out of the investigation by the Conservation Officer Service. Mr. Morley argues that certain facts upon which the Board relied for its decision in the first appeal have not proven to be true. Specifically, he submits that the Board did not have accurate information regarding the *manner* in which the bighorn sheep horns and cape were retrieved.

Mr. Morley speculates that the Board drew the following conclusions from the evidence obtained at the first hearing:

> A helicopter wildlife survey was taking place … Aboard the aircraft, in addition to the pilot was Dave Beranek, Larry Ingham … and Bill Hanlon … A large big horn sheep was spotted and they all agreed to investigate. A very large set of horns was found when they landed and these were retrieved by them and Mr. Beranek subsequently applied for the subject permit.

Mr. Morley notes that Mr. Ingham held a permit allowing him to possess and transport dead wildlife and parts thereof.

The new evidence that Mr. Morley submits should be considered by the Board is that Mr. Ingham was not in the helicopter when the horns were transported. Rather, Mr. Beranek returned with the helicopter pilot to pick up the horns after dropping off Mr. Ingham and Mr. Hanlon. Mr. Morley states that section 2.2 of the *Wildlife Act Permit Regulations* says that a possession permit cannot be issued where a person killed or captured wildlife contrary to the *Act* or regulations. Section 2.2 states:

2.2 For the purpose of section 33 (1) and (2) of the Act and section 1(i) and (l) of this regulation, a permit shall not be issued to authorize a person to possess wildlife or parts of it, where the person killed or captured the wildlife contrary to the Act or the regulations, except where the wildlife was killed for the protection of life or property.

Mr. Morley submits that the legality of the pick-up is therefore important, and the evidence of illegal activity, which has now come to light, should be considered. He also says that illegal activity related to the find was considered relevant by the Panel in the previous appeal as it notes "there are no grounds on which to suspect any illegal activity associated with the find."

Mr. Beranek submits that there is no authority for the Board to reopen the original appeal either under the *Wildlife Act* or the *Environment Management Act*. Since no authority exists in statute, there is no jurisdiction for the Board to reopen the appeal to consider new evidence.

Generally, once a tribunal has rendered a decision, its jurisdiction has been expended and it may take no further action unless it is expressly authorized to do so by statute. This is the essence of the principle of *functus officio*. As stated by Mr. Beranek, the Board has no authority under either the *Environment Management Act* or the *Wildlife Act* to reopen an appeal.

However, the courts have found that a tribunal can reopen a hearing in certain circumstances. The Supreme Court of Canada has stated that, once an administrative tribunal has reached a final decision on a matter before it, "that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there is a change in circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd.* v. *Ross Engineering Corp., supra*" (*Chandler* v. *Alberta Association of Architects*, [1989] 62 D.L.R. (4th) 577 at 596). The Court in *Chandler* also stated that the application of this rule (*functus officio*) must be "more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal."

A "slip" is a clerical, spelling or other non-substantive error. An "error" includes a failure to properly express the intention of the tribunal or where a procedural defect produces a breach of natural justice. Procedural defects that have been grounds for reopening a final decision include wrongful refusal to hear evidence, failure to provide a party an opportunity to respond, and neglecting to follow mandated procedures. Where a court has not quashed a tribunal decision, the decision to reopen an appeal is a matter for the tribunal to decide at its discretion (*Gill* v. *Canada (Minister of Employment and Immigration)*, [1987] F.C.J. No. 53).

A tribunal may also reconsider a final decision that has been quashed by a court (*Finch* v. *Association of Professional Engineers and Geoscientists of British Columbia*, [1996] 73 B.C.A.C. 295).

There is no evidence that a procedural error amounting to a breach of natural justice occurred during that appeal hearing. Mr. Morley had ample opportunity

during the course of that hearing to investigate the matter, present evidence, and state his case to the Board. Essentially, Mr. Morley is asking the Board to reopen the hearing to consider a change in the facts or circumstances known at the time of the original hearing. However, it is not clear that the Board has the jurisdiction to reopen a hearing in these circumstances and Mr. Morley did not make any submissions on the Board's jurisdiction to do so. In the Board's view, it does not have the jurisdiction to reopen its final decision in Mr. Beranek's earlier appeal in the circumstances.

The Board finds that its intention was properly expressed in its decision on Mr. Beranek's earlier appeal, and the new evidence is not a "slip" or clerical error. It is even questionable whether it is truly "new" evidence, as it appears to be information that was obtainable at the time of the initial hearing.

In any event, this evidence regarding the manner in which the horns were transported would not likely have changed the Board's decision. The Board is not convinced that the "illegal activity" referenced by the Regional Manager would have changed the initial decision. At the time of the first hearing, the Board, and the Regional Manager, were aware that the horns had been transported by helicopter. Mr. Morley's assumption that Mr. Ingham's permit to possess and transport dead wildlife played a part in the Board's decision is not supported by the decision itself. The Board's decision contains no information relating to Mr. Ingham or his permit, and there is no indication that the Board relied upon the presence of such a permit when making its decision.

Further, the Board is not convinced that either section 27(2)(b) of the *Act* or section 2.2 of the *Wildlife Act Permit Regulations* are intended to address the transport of horns found outside of the context of a hunting expedition.

Accordingly, the Board finds that this is not an appropriate case to reopen an appeal. The Board's October 5, 1998 decision stands; including its direction that Mr. Beranek be issued a possession permit.

DECISION

In making this decision, the Panel of the Environmental Appeal Board has carefully considered all of the evidence before it, whether or not specifically reiterated here.

The Board finds that there is no appealable decision before it. Therefore, the Board does not have jurisdiction over the matter and dismisses Mr. Beranek's appeal of the February 19, 1999 decision of Mr. Daloise accordingly.

The Board further finds that the circumstances do not justify reopening its October 5, 1998 decision in Appeal No. 98-WIL-23, *David Beranek* v. *Regional Wildlife Manager*.

Toby Vigod, Chair
Environmental Appeal Board

May 11, 1999