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## DECISION NO. 2009-WIL-002(b)

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

<b>BETWEEN:</b>	Pacific Northwest Raptors Ltd.	<b>APPELLANT</b>
<b>AND:</b>	Regional Manager	<b>RESPONDENT</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Alan Andison, Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on March 19, 2009	
<b>APPEARING:</b>	For the Appellant: Gillian Radcliffe For the Respondents: Dick Heath	

### ISSUE OF JURISDICTION

[1] Pacific Northwest Raptors Ltd. ("PNWR") appealed the February 5, 2009 decision of Dick Heath, Regional Manager, Recreational Fisheries and Wildlife Program, Vancouver Island Region (the "Regional Manager"), Ministry of Environment (the "Ministry"), to refuse PNWR's application for a "special authorization" permit for the rehabilitation of a juvenile male bald eagle.

[2] On February 16, 2009, PNWR advised the Board that the eagle was no longer in PNWR's possession, as it had returned to the wild. In spite of this, PNWR advised that it would like to proceed with the appeal.

[3] The Board sought submissions from the Regional Manager on PNWR's request to proceed with the appeal.

[4] This matter has been conducted by way of written submissions.

### BACKGROUND

[5] PNWR is a Bird of Prey and Falconry Center located in Duncan, BC. PNWR's activities include bird of prey flying demonstrations, falconry courses, tours of its facilities, educational programs, children's summer camps and school programs, film and media work and nuisance bird control. Most of the birds of prey used at the centre are captive bred, not wild birds, with the exception of a small number of permanently disabled wild raptors.

[6] PNWR holds a number of permits that authorize its activities. One of PNWR's permits authorizes it to temporarily hold and care for injured raptors, subject to condition 11 in Appendix A, which states:

Permit holder may temporarily hold or care for injured raptorial birds brought to their attention by members of the public for the purposes of rehabilitation. *Such birds are not to be kept for rehabilitation at the permit holder's facility, but must be transferred to a designated wildlife rehabilitation centre within two weeks unless otherwise authorized by the Ministry of Environment.* [emphasis added]

[7] The Board has previously considered the merits of condition 11 in Appendix A. In *Pacific Northwest Raptors Ltd. v. Regional Manager et al.* (Decision Nos. 2006-WIL-005(a) & 2006-WIL-016(a), January 12, 2007), the Board confirmed the condition<sup>1</sup> based on the following findings:

The Panel finds that the current Ministry policy against issuing simultaneous permits for breeding and rehabilitation is reasonable. There is clearly a potential for conflict of interest when both commercial breeding and wildlife rehabilitation activities are being conducted in the same facility.

...

Further, the Panel finds that PNWR has established no compelling reason to deviate from this policy. Accordingly, the application of the policy to the individual circumstances of PNWR is not unreasonable or unfair. The Respondents have attempted to be responsive to the unique situation of PNWR by recognizing that, as a result of its business and profile in the community, it may occasionally receive injured birds. The Ministry has allowed it to perform short term rehabilitation or transportation to a rehabilitation facility or, in special cases, to seek other authorization from the Ministry. There is no compelling evidence that this condition is unreasonable.

Accordingly, the Panel finds that condition 11 in Appendix A to the Permit is based upon the valid policy objective of protecting against both a real and perceived conflict of interest, and it is reasonable and justified in the circumstances.

[8] The following sequence of events regarding the present appeal is summarized from PNWR's submissions:

On July 25, 2008, PNWR received a newly fledged juvenile bald eagle with a badly broken wing. Dr. Ken Langelier operated on the eagle to

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<sup>1</sup> Some of the background information in this decision has been recited from the Board's January 12, 2007 decision.

repair his wing. Dr. Langelier has been involved with the subsequent care and treatment of the bird, which has been named "Sir Claws".

On July 29, 2008, PNWR wrote to the Ministry to advise that PNWR had Sir Claws, that the bird required rehabilitation, and to ask whether PNWR should apply for a special permit for Sir Claws and several other birds that PNWR had had for two weeks or more.

In September 2008, following a veterinary examination, PNWR began flight training with Sir Claws. The objective of the training is to build the bird's strength and skills through a variety of "free flying" falconry exercises.

On November 10, 2008, PNWR sent a letter to the Ministry providing an update on the progress of Sir Claws and other birds in PNWR's care.

On November 30, 2008, Ministry staff telephoned PNWR and advised that it had to relocate all of the birds mentioned in the November 10 letter by December 12, 2008, and that a letter to that effect would be sent by the Regional Manager.

In the first week of December 2008, PNWR received another telephone call from the Ministry, advising that the deadline for moving the birds had been extended to December 19, 2008.

[9] On December 11, 2008, PNWR applied to the Ministry for the "special case" rehabilitation permit for the eagle. On the application form, PNWR states the purpose for the permit, as follows:

Flight training/exercise & development of hunting skills of juvenile (2008) bald eagle with broken wing. Intention is ultimate release if medical condition, flight progression & adequate survival skills are achieved. Operation was performed by Dr. Ken Langelier.

[10] On February 5, 2009, the Regional Manager issued his decision refusing PNWR's permit application. His decision states, in part:

Under Ministry of Environment Procedure Manual Vol. 4 Section 7 Subsection 12.05 Page 10 of 12, *"A permit may only be issued to an individual for the purposes of wildlife rehabilitation or furnishing of first aid, if a Designated Wildlife Rehab Centre, zoo, or previously permitted wildlife research project is not available to care for the wildlife."*

Currently the North Island Wildlife Recovery Centre (NIWRC), a permitted Designated Wildlife Rehabilitation Centre, has available space, is willing to rehabilitate this eagle, and has an appropriately sized flight pen facility for this purpose.

The use of flight pens is currently recognized as the most effective method for rehabilitating and prerelease conditioning of bald eagles.

Please transport the juvenile bald eagle to NIWRC by February 16, 2009. IF NIWRC has not received the eagle by this date, the Ministry will follow up as appropriate to ensure the transfer occurs.

[italics in Regional Manager's letter]

[11] On February 10, 2009, PNWR filed a Notice of Appeal of the Regional Manager's decision. In its Notice of Appeal, PNWR requested a stay of the decision, pending a decision on the merits of the appeal.

[12] On February 13, 2009, the Board denied PNWR's application for a stay (Decision No. 2009-WIL-002(a)).

[13] By letter dated February 16, 2009, PNWR advised the Board that the juvenile bald eagle had returned to the wild. PNWR requested that the Board still hear the appeal. That letter is re-produced as follows:

The juvenile eagle "Sir Claws" has not been transferred to NIWRC, as he is no longer in our possession. On Saturday when out flying he went off foraging on his own and did not wish to return. Yesterday he was seen in the company of 4 wild bald eagles several kilometers from here. He is no longer responsive to us and has thus returned to the wild.

As the bird is no longer in captivity, I appreciate the appeal over his fate is something of a moot point. Nonetheless, I request that the Board consider this appeal anyway, as it is part of a repeating pattern and the same situation is inevitably going to recur. We would like to appeal Mr. Heath's decision in the hope we can establish a reasonable process for making special case applications that will be fully & fairly considered.

## **ISSUE**

[14] Whether the appeal should proceed in the circumstances.

## **DISCUSSION AND ANALYSIS**

### **Whether the appeal should proceed in the circumstances**

[15] PNWR acknowledges that the appeal is "something of a moot point". Nevertheless, as noted above, PNWR requests that the appeal proceed for the following reasons:

... it is part of a repeating pattern and the same situation is inevitably going to recur. We would like to appeal Mr. Heath's decision in hope we can establish a reasonable process for making special case applications that will be fully and fairly considered.

[16] In its Notice of Appeal, PNWR objected to the Regional Manager's decision on the basis that it will:

- result in direct negative impact upon the bird;
- reduce the future wild survival capability of the bird;
- entirely undermine many months of collaborative work between PNWR and the veterinarian on the case; and
- will curtail an important learning opportunity that has the potential in future to benefit a broader wildlife resource.

[17] The Regional Manager's submissions did not directly address the question of whether the appeal should proceed. However, the Regional Manager stated that the Ministry's rationale for not issuing the permit to PNWR in this case is "reflected in" the Board's 2007 decision on PNWR's previous appeals.

*Panel's findings*

[18] The Board has carefully considered the appeal file and the parties' submissions. The question before the Board is whether it should hear the appeal when the eagle that was the subject of PNWR's permit application is no longer in PNWR's possession. Put another way, has the appeal now been rendered "moot"?

[19] The test for mootness was set out by the Supreme Court of Canada in *Borowski v. The Attorney General of Canada*, [1989] 1 S.C.R. 342 ("*Borowski*"). Writing for the Court, Sopkina J. described a moot case as one that did not involve "a live controversy or concrete dispute" which affects the rights of the parties. He states at page 357:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term

“moot” applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the “live controversy” test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[emphasis added]

[20] The Court expressed three basic rationales for not deciding moot cases. They are:

1. A recognition of the importance of an adversarial context to the competent resolution of legal disputes;
2. A concern for conserving scarce judicial resources; and
3. A concern that the Court not be seen to be intruding into the role of the legislative branch by pronouncing judgments in the absence of a dispute affecting the rights of the parties.

[21] PNWR’s main grounds for appeal relate to whether the Regional Manager’s decision was in the best interests of the eagle. Now that the eagle has returned to the wild, the Board finds that a decision on the appeal would have no practical effect on the parties’ rights. Applying the test in *Borowski*, the Board finds that there is no “live controversy” because the bird is gone. The Board’s powers on an appeal are limited to those set out in section 101.1(5) of the *Wildlife Act*, which are as follows:

(5) On an appeal, the appeal board may

- (a) send the matter back to the regional manager or director, with directions,
- (b) confirm, reverse or vary the decision being appealed, or
- (c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

[22] Although PNWR suggests that this type of appeal may arise again in the future, the Board’s authority is limited to the decision under appeal. It has no authority to make orders affecting future decisions by the Regional Manager. Moreover, any future permit applications by PNWR should be assessed based on the circumstances of the particular case. If PNWR applies for a permit in the future, and if PNWR is not satisfied with the Regional Manager’s decision on that application, PNWR has the right to file an appeal with the Board.

[23] To hold a hearing and make a decision on this appeal would require the expenditure of significant resources, without the benefit of an effective remedy. While there have been cases where the Board has found an appeal moot but

provided some guidance to the parties for future reference, this has normally occurred when the issue of mootness was identified after the hearing had already taken place, and where in the interests of judicial economy (i.e., to avoid repetition of the case), the Board was in a position to comment. That is not the situation in the present case. In this case, no submissions on the merits of the appeal have been filed and no hearing has commenced.

[24] Finally, the Board notes that the appeal process is time consuming and leads to uncertainty for those involved. Therefore, it is in the respective interests of the parties to attempt to discuss and resolve the issues in order to avoid future appeals.

## **DECISION**

[25] In making this decision, the Panel has considered all of the evidence and submissions before it, whether or not specifically reiterated herein.

[26] Given the foregoing, the Board hereby dismisses the appeal as the appeal is moot.

[27] The Board will close its file on this matter.

"Alan Andison"

Alan Andison, Chair  
Environmental Appeal Board

April 3, 2009