



Environmental Appeal Board

Fourth Floor, 747 Fort Street
Victoria BC V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.eab.gov.bc.ca
Email: eabinfo@gov.bc.ca

DECISION NO. 2019-WIL-001(a)

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

BETWEEN:	Audra Tina Hartnell	APPELLANT
AND:	Section Head, Fish and Wildlife	RESPONDENT
BEFORE:	A Panel of the Environmental Appeal Board: Darrell LeHouillier, Chair	
DATE:	Conducted by way of written submissions concluding on September 24, 2019	
APPEARING:	For the Appellant: Audra Tina Hartnell For the Respondent: Emma Thomas, Counsel	

APPEAL

[1] This appeal concerns possession of a dead golden eagle. The Appellant, Audra Tina Hartnell, is classified as an Indian under the *Indian Act* and relies on that status in arguing that she should be granted a permit allowing her to possess the eagle. The Respondent, the Fish and Wildlife Section Head for the Peace Region of British Columbia (the "Section Head"), says that the province should retain ownership and possession of the eagle.

[2] The Environmental Appeal Board has the authority to hear this appeal under section 101.1 of the *Wildlife Act*, and has the power to make the following decisions:

- confirm, reverse, or vary the Section Head's decision;
- return the matter back to the Section Head, with directions; or
- make any decision that the Section Head could have made and that the Board considers appropriate in the circumstances.

BACKGROUND

[3] Ms. Hartnell is a member of the Tahltan First Nation. She lives in Charlie Lake, in the Peace Region of British Columbia, outside of the traditional territory of the Tahltan people.

[4] On or around January 26, 2019, Ms. Hartnell was checking a lawfully set trapline in the Peace Region to catch fur-bearing animals. She was acting as an assistant to the licensed owner of that trapline. When Ms. Hartnell checked the trapline, she discovered one bird had been caught and killed in each of two different traps along the line: a boreal owl and a golden eagle.

[5] She applied to the province for a permit allowing her to keep the owl and the eagle. A permit is required because, under section 2 of the *Wildlife Act*, ownership of all wildlife in British Columbia, whether dead or alive, is vested in the government. The same section allows the government to give a person the right of property in its wildlife, or a right to possess that wildlife, through a permit or licence.

[6] Section 2 of the *Wildlife Act Permit Regulation*, B.C. Reg. 253/2000 (the "*Regulation*") describes the various types of permits that can be granted under the *Act* and their purposes. The permits considered in relation to this appeal are those described in sections 2(k) and 2(p) of the *Regulation*.

[7] Section 2(k) allows a permit authorizing:

- (i) a person to possess and dispose of dead wildlife or parts of wildlife for scientific or educational purposes, or
- (ii) a person to possess and dispose of dead wildlife or parts of wildlife for a ceremonial or societal purpose.

[8] Section 2(p) allows a permit to be issued "transferring the right of property in dead wildlife or wildlife parts from the government to a person".

[9] On March 13, 2019, Ms. Hartnell completed a form entitled "Certification of Wildlife Specimen", in which she requested an officer under the *Wildlife Act* to evaluate the owl and the eagle so she could apply for a permit to own or possess the two birds. Ms. Hartnell also completed a Fish and Wildlife Application form. This form asks individuals applying for a permit to explain their proposed use of that wildlife. Ms. Hartnell described the proposed use for the golden eagle as sending it to the taxidermist.

[10] Ms. Hartnell's application and "Certification of Wildlife Specimen" did not reference any societal or ceremonial purposes for her request, although she provided a copy of her Indian status card.

[11] A Natural Resource Specialist, Ms. Hewitt, who processed Ms. Hartnell's request, inferred that Ms. Hartnell may have applied for the golden eagle for societal or ceremonial purposes under section 2(k)(ii) of the *Regulation* because a copy of her Indian status card was included with her request. On an unspecified date, Ms. Hewitt emailed Ms. Hartnell, reportedly to obtain further information. Ms. Hartnell emailed back on April 12, 2019 and confirmed that she intended to use the golden eagle for "ceremonial/educational" purposes.

[12] Also on April 12, 2019, Ms. Hewitt sent a referral letter and Ms. Hartnell's application to the Chief of the local First Nation, the Doig River First Nation, which has recognized treaty rights in the relevant area of the Peace Region. Ms. Hewitt requested a reply by April 29, 2019. No reply was received and Ms. Hewitt

concluded the consultation process, deciding that any infringement of aboriginal rights associated with considering Ms. Hartnell's request was minor and that no further consultation with the Doig River First Nation was necessary.

[13] Subsequently, Ms. Hewitt sent the information she had compiled to the Section Head for a decision. The Section Head's authority to address Ms. Hewitt's application under the *Wildlife Act* was delegated to him by a regional manager appointed under the *Wildlife Act*.

[14] Before issuing a permit for the owl and the eagle, section 5(1) of the *Regulation* requires the Section Head to be satisfied that Ms. Hartnell: (a) meets "the specific requirements" for a permit under any applicable portion of section 2 of the *Regulation* and (b) "that issuing the permit is not contrary to the proper management of wildlife resources in British Columbia". The Section Head concluded that these pre-conditions were met for the boreal owl, but not the golden eagle.

[15] The Section Head determined that Ms. Hartnell did not live within the geographical boundaries of the Tahltan First Nation or within several hundred kilometres of those boundaries. Because of the lack of detail in Ms. Hartnell's application and this distance, the Section Head could not justify issuing a permit for the golden eagle for societal or ceremonial purposes. The Section Head determined that none of the circumstances of the other subsections of section 2 of the *Regulation* permitting the possession or transfer of ownership of the eagle were satisfied in this case.

[16] In a letter dated May 3, 2019, the Section Head denied Ms. Hartnell's request for the golden eagle. He referred to sections 2(p) and 6(1)(c)(i) of the *Regulation*.¹ There was no mention of section 2(k)(ii) of the *Regulation*, which addresses applications for permits to possess dead animals for societal or cultural reasons.

[17] In a separate letter dated May 3, 2019, the Section Head granted Ms. Hartnell's request for possession of the boreal owl. The Section Head granted this request because boreal owls did not attract the sort of protection golden eagles did, and it was possible that there were indigenous ceremonial or societal uses for the boreal owl of which the Section Head was unaware.

[18] Ms. Hartnell appealed the May 3, 2019 denial of her request for a permit to possess the golden eagle to the Environmental Appeal Board. She asks the Board to grant her a permit to possess the golden eagle for ceremonial and societal reasons.

[19] The Section Head asks that Ms. Hartnell's appeal be denied.

¹ Section 6(1)(c)(i) of the *Regulation* prohibits a regional manager from issuing a permit transferring a right of property in antlers; however, the Section Head referenced that section in error. He meant to refer to section 6(1)(c)(ii)(A) of the *Regulation*, which prohibits a regional manager from issuing a permit transferring the right of property in eagles, or any parts of them.

ISSUES

[20] There are three issues that I must decide in this appeal:

1. Has Ms. Hartnell established any aboriginal right to the golden eagle?
2. If so, did the Section Head adequately consult with the relevant indigenous community before denying Ms. Hartnell's request for the golden eagle?
3. Should the Board grant Ms. Hartnell's request for a permit to possess the golden eagle for societal or ceremonial purposes, pursuant to section 2(k)(ii) of the *Regulation*?

[21] Although the Section Head's decision referenced section 2(p) of the *Regulation*, which allows a regional manager to transfer property rights in dead wildlife or parts of wildlife to an individual, Ms. Hartnell has indicated that she did not apply for ownership of the golden eagle under that section and does not rely on it in her appeal. As a result, I will not discuss section 2(p) of the *Regulation* in further detail, other than to note that section 6(1)(c)(ii)(A) of the *Regulation* prohibits a transfer of ownership in eagles or parts of eagles under section 2(p) of the *Regulation*.

[22] Furthermore, the Section Head indicated he was unsure if Ms. Hartnell had challenged the constitutional validity of relevant portions of the *Wildlife Act*. No such challenge was clear to me; rather, I interpreted Ms. Hartnell's submissions as indicating that the application of the *Wildlife Act* infringed her aboriginal rights. Even if I am wrong, however, Ms. Hartnell did not provide notice to the Attorneys General of British Columbia and Canada of her intent to challenge the constitutional validity of the *Wildlife Act*. Such notice must be provided to challenge the constitutional validity of legislation, according to the *Constitutional Question Act*, R.S.B.C., 1996, c. 68. As no such notice was provided in this case, I cannot consider whether the *Wildlife Act* itself is constitutional.

HEARING PROCEDURE

[23] After receiving Ms. Hartnell's Notice of Appeal, the Board responded on June 12, 2019. The Board determined that the appeal would be considered by way of written submissions, barring any objections. Neither party objected.

[24] The same letter outlined a schedule for the submission of evidence and argument. Ms. Hartnell was to provide her submissions and documents by July 10, 2019. She did so. The Section Head was to provide his submissions and documents by July 24, 2019. He did so. Ms. Hartnell had the opportunity to respond, without being allowed to admit further evidence, by August 7, 2019. Ms. Hartnell did not provide any reply submissions.

[25] After reviewing the submissions of the parties, I concluded that Ms. Hartnell did not have adequate knowledge of the case she had to meet. The Section Head's May 3, 2019 decision letter, which is the subject of this appeal, did not mention section 2(k)(ii) of the *Regulation* or any of the decision-making process that the Section Head described undertaking with respect to that subsection. Ms. Hartnell first became aware of his reasoning after she had filed her written submissions

and documents on July 10th. Given this timing, Ms. Hartnell did not know the case she had to meet prior to writing her submissions and providing her evidence. She had been directed by the Board not to introduce further evidence in her reply, so she did not have a fair opportunity to respond to the case against her.

[26] As a result, I asked the Board's Registrar to propose a schedule for the submission of further evidence and argument. A further process of written submissions followed. Ms. Hartnell provided her submissions and the Section Head replied. Ms. Hartnell had a further opportunity for response but did not provide any further submissions.

THE PARTIES' SUBMISSIONS ON THE APPEAL

Ms. Hartnell's Submissions

[27] Ms. Hartnell intends to preserve the golden eagle through taxidermy for the use of her family and the Tahltan Community, where possible. Although Ms. Hartnell states that she does not have any immediate ceremonial use for the eagle, keeping it would allow her to preserve traditional symbols, customs, and practices. The eagle could be used for future ceremonies, such as during a wake held for family members in the event of their deaths.

[28] Ms. Hartnell describes the "shrinking customs and practices" within her family and Tahltan society overall. The eagle would serve as a reminder of the traditional Tahltan way of life for Ms. Hartnell's family, many of whom reside in traditional Tahltan territory. Ms. Hartnell hopes that the eagle will make its way to traditional Tahltan territory, but she did not describe any plans for how this would be accomplished.

[29] Ms. Hartnell argues that eagles are important to society and First Nations' ceremonies, as eagles are associated with courage, strength, vision, and freedom. The eagle also serves as a reminder to the creation stories and is respected during ceremonies.

[30] Of particular relevance to Ms. Hartnell, eagles are greatly respected among the Tahltan. The feathers of golden eagles were reportedly used to plume arrows and were thought to bring good luck in hunting.

[31] Ms. Hartnell believes that she has a right to keep a golden eagle as part of her traditional heritage and Indian status, which includes a connection to and rights to the land, as well as a right to animals that hold traditional or sacred value. This applies regardless of where she lives.

[32] Ms. Hartnell argues that the Section Head failed to properly consider her Indian status in considering her request to possess the golden eagle for ceremonial and societal purposes, despite having appropriately considered that status when granting her a permit to possess the boreal owl for those same purposes. Ms. Hartnell argues that this infringes her rights to practice her beliefs as her ancestors did, and that she should be allowed to maintain such traditions wherever possible.

[33] Ms. Hartnell states that, even though there is no specific ceremonial need for the eagle at the present time, it would be kept for societal purposes. The importance of the eagle to Ms. Hartnell's family is not diminished by the lack of concrete plans for a specific ceremonial use. She states that the Section Head acknowledged not having complete knowledge of cultural/societal uses for boreal owls, and the same can be said for his state of knowledge regarding the cultural/societal uses of golden eagles. His rationale for denying the permit because he was not aware of any cultural/societal use for a preserved golden eagle should, accordingly, be given little weight.

The Section Head's Submissions

[34] With respect to the question of aboriginal rights, the Section Head referenced the legal tests for determining aboriginal rights and whether those rights have been infringed, as set out in *R. v. Sparrow*, [1990] 1 SCR 1075. The first step in that analysis is whether there was an existing aboriginal right. The Section Head references *R. v. Van der Peet*, [1996] 2 SCR 507 [*R. v. Van der Peet*] as explaining that first step in detail.

[35] *R. v. Van der Peet* indicates that, to qualify as an aboriginal right, "... an activity must be an element of practice, custom or tradition integral to the distinctive character of the aboriginal group claiming the right." This is done taking into account the perspectives of the aboriginal people. The activity must be distinctive and of independent "central significance to the aboriginal society in question" and have continuity with practices, customs, and traditions that pre-date contact with European settlers.

[36] The Section Head argues that Ms. Hartnell did not identify a precise right, although she discussed the traditional uses of feathers in ceremonies and hunting. She described the importance of eagles to the Tahltan people and to First Nations generally, but did not provide any evidence beyond her own "general opinion". The Section Head submits that this information is insufficient to establish the activity as an aboriginal right, as described in *R. v. Quipp*, [1997] BCJ No. 1205. The Section Head argues that the analysis accordingly ends there.

[37] The Section Head argues that Ms. Hartnell's application was reasonably and legally rejected because she did not describe any specific use for the eagle, including any ceremonial functions. Furthermore, Ms. Hartnell did not live within Tahltan territory and had not described how the eagle would be used for ceremonial purposes within that territory.

[38] The Section Head refers to various cases where individuals have asked for ownership or possession of dead eagles; however, with the exception of two Environmental Appeal Board cases referred to below, I find that these cases are not generally persuasive given the facts of this case. I will not describe those cases in any detail, other than to say that I reviewed and considered them before deciding this appeal.

[39] In *Hansen v. British Columbia (Ministry of Water, Land and Air Protection)*, [2001] BCEA No. 31 [*Hansen*], the Board considered an individual who applied for a permit to possess an eagle for educational purposes under section 2(k)(i) of the

Regulation. The applicant in that case intended to keep the eagle in his home with other animal specimens. He made the specimens available for public viewing and had, on occasion, made them available to a nearby school. The Board considered the “main use” of the wildlife to be the applicable test, and concluded that this applicant’s main use of the eagle would be displaying it in his home. The Board found that, having its primary use in his home was inconsistent with the intended use of the animal being for educational purposes.

[40] *Willox v. British Columbia (Ministry of Water, Land and Air Protection)*, [2005] BCEA No. 2 [*Willox*] involved similar facts, where an individual applied for a permit to possess an eagle for educational purposes. He intended to make the eagle available to naturalist clubs, schools, and bird festivals, and he had a history of making specimens of other birds available to a bird festival for educational purposes. As in *Hansen*, the Board concluded that the primary purpose for the eagle was personal use and display.

[41] The Section Head argues that Ms. Hartnell’s case is similar to the cases in *Hansen* and *Willox*, insofar as Ms. Hartnell intends to display the golden eagle privately and, therefore, the primary purpose for the eagle is not one of the purposes captured within section 2(k) of the *Regulation*.

[42] Furthermore, the Section Head states that, in his experience, permit applications to use eagles for ceremonial or cultural purposes usually involve eagle parts. Typically, the government prefers to distribute animal parts to provide a greater benefit from one animal, rather than transferring a whole animal to an applicant. There are exceptions, however, including when an entire eagle was given to an indigenous community in 2016, to be buried with a deceased elder.

[43] The Section Head adds that he reviewed a tracking sheet and found that most requests since 2015 were specific to eagle wings and feathers. He provided a copy of the tracking sheet as evidence. Upon review of the tracking sheet, I note that it does not list the eagle given to an indigenous community in 2016. I also note that, since 2015, seven eagle-related requests were made: three specified eagle wings or feathers; one was for a golden eagle and/or hawks; two were for bald eagles; and one request was for bald eagle feathers or a carcass.

[44] The Section Head argues that Ms. Hartnell has not described a specific societal use for the golden eagle. Further, her application was vague, and it seemed to him that she intended the eagle to be preserved by taxidermy for personal use.

[45] The Section Head emphasizes that, had Ms. Hartnell sought a permit for some eagle feathers, he would have granted that request. The government did not have any other golden eagles and had to deny a request for one to be provided for a ceremony held in August 2019, which was to honour and remember missing and killed indigenous women.

[46] In the appeal, the Section Head also referenced the Board’s decision in *Gent v. British Columbia (Ministry of Environment, Lands and Parks)*, [1999] BCEA No. 8 [*Gent*], in which the province provided evidence that eagle parts were in high demand from indigenous communities and it was difficult to satisfy this demand.

[47] In sum, the Section Head denied Ms. Hartnell's application because it seemed to him that her intended primary use was personal. The request for the whole animal seemed unusual to him given that, more commonly, requests on ceremonial grounds involved use of eagle parts, rather than the whole eagle. The Section Head concluded that Ms. Hartnell had not met the specific requirements for the issuance of the permit under section 2(k) and, therefore, section 5(1)(a) of the *Regulation* did not allow him to grant her request. Furthermore, he was concerned that granting her request would prejudice other indigenous groups from seeking golden eagle feathers. Section 5(1)(b) of the *Regulation* allows regional managers to grant permits under section 2 of the *Regulation* only if the permit would not be contrary to the proper management of wildlife resources in British Columbia. The Section Head states that Ms. Hartnell's proposed use of the golden eagle did not, and does not, satisfy that requirement.

DISCUSSION AND ANALYSIS

1. Has Ms. Hartnell established any aboriginal right to the golden eagle?

[48] Ms. Hartnell described, in her submissions, the respect the Tahltan people have for golden eagles and the traditional importance those eagles have among the Tahltan people. She asserts that she has a right to animals that hold traditional or sacred value to her people, and that she has the right to practice her beliefs as her ancestors did.

[49] Aboriginal rights cannot simply be asserted as a blanket statement. While I have considered Ms. Hartnell's submissions and have considered her perspective, she has not provided enough information to establish that she has an aboriginal right to the golden eagle. She did not satisfy the first test in *R. v. Sparrow*, as elaborated in *R. v. Van der Peet*.

[50] Ms. Hartnell described the importance of eagles to indigenous communities generally, and to the Tahltan people specifically. She also described the respect that indigenous peoples have for golden eagles; however, she did not describe any activity, practice, custom, or tradition involving the use of the golden eagle, other than the use of feathers for fletching arrows while hunting and the use of golden eagles during wakes.

[51] Ms. Hartnell did not present sufficient information to allow me to conclude that the use of the golden eagle or golden eagle feathers, even with the uses she described, was integral to the distinctive character of the Tahltan people. She did not provide enough information to show that the use of the golden eagle or its parts was of central significance to the Tahltan people's society, or that such any such practices, customs, or traditions had continuity with those in place before the Tahltan came in contact with European settlers.

[52] Each of those deficiencies alone would be sufficient to deny Ms. Hartnell's appeal on this first issue. She bears the burden of proof in this appeal. I conclude, based on the information available to me, that Ms. Hartnell has not established any aboriginal right to the golden eagle.

2. **If Ms. Hartnell established any aboriginal right to the ownership of the golden eagle, did the Section Head adequately consult with the relevant indigenous community before denying Ms. Hartnell's request for the golden eagle?**

[53] Given that I have concluded that Ms. Hartnell has not established any aboriginal right to the golden eagle, I do not need to address this issue.

3. **Should the Board grant Ms. Hartnell's request for a permit to possess the golden eagle for societal or ceremonial purposes, pursuant to section 2(k)(ii) of the *Regulation*?**

[54] I find that Ms. Hartnell has not established that her principal intended use of the golden eagle is for ceremonial purposes. While she foresees featuring the eagle during wakes for deceased family members, she provides no definitive plan for those proposed uses; I find that Ms. Hartnell's proposed ceremonial uses lack detail and seem related to specific incidents that may occur during an unknown timeframe and with an unspecified frequency. As I have noted, Ms. Hartnell bears the burden of proof in this appeal. She has not provided sufficient evidence to establish that the primary use of the golden eagle is for ceremonial purposes.

[55] As for societal uses, Ms. Hartnell describes wanting the eagle to help combat the erosion of the traditional culture of her people. This could qualify as a societal use; however, Ms. Hartnell did not describe how she intends for this to occur. She asserts that having the eagle visible to family, including those living in the Tahltan territory, will accomplish the aim but did not describe any regular or concrete circumstances in which this might be done. She also hopes the eagle will make its way to traditional Tahltan territory but does not describe how this might be accomplished. I find that she has not described any societal use for the eagle, other than as a side-effect of having it displayed for her personal enjoyment.

[56] Similar to the circumstances described in *Hansen* and *Wilcox*, Ms. Hartnell's intended use of the eagle predominantly involves private display, even if there are instances when the eagle will be used for other purposes authorized under the *Regulation*. These uses were less persuasively presented than the uses described in *Hansen* and *Wilcox*. I conclude in this case, as the panel did in those cases, that the predominant use for the eagle is for personal display.

[57] To be clear, I have not taken *Hansen* or *Wilcox* to be precedent cases that I must follow. Rather, I have considered them persuasive and have arrived at the same conclusion for similar reasons, in cases involving similar fact patterns. I have not restricted my assessment of the "primary use" of the golden eagle to considering the amount of time that the eagle would be used for various purposes. That is one factor I considered, but I also considered what seems to be the main purpose for the eagle: personal display. While Ms. Hartnell was open to using the eagle in wakes and to support Tahltan culture as periphery to that, I find that the eagle's main purpose is for personal display.

[58] Overall, I conclude that Ms. Hartnell views the golden eagle as something of significance due to her indigenous heritage; however, her evidence does not

establish any plans for regular contact with Tahltan society, nor does she provide any persuasive detail about how the golden eagle might be of societal use to the Tahltan, particularly given that she does not live on or near traditional Tahltan territory. I wish to emphasize that, while Ms. Hartnell argued that her aboriginal rights apply wherever she lives, she has not established that any aboriginal rights apply to her interest in the golden eagle. Again, Ms. Hartnell bears the burden of proof.

[59] Section 5(1)(a) of the *Regulation* states that the Section Head, and now myself as I stand in the shoes of the Section Head, must be satisfied that the applicant (Ms. Hartnell) meets the specific requirements for the permit set out in the *Regulation*. Ms. Hartnell did not establish to my satisfaction that her intended primary use of the golden eagle is for ceremonial or societal purposes.

[60] In reaching this conclusion, I wish to emphasize that I was not persuaded by the Section Head's comments that it was uncommon for whole eagles to be used in ceremonies. The Section Head did not describe sufficient education, experience, or training to establish to my satisfaction that he is qualified to offer such expert opinion evidence on the ceremonial practices of indigenous groups generally or the Tahltan specifically. I also found his analysis referencing the tracing sheet to be problematic for a range of reasons. Lastly, I did not find *Gent* to persuasively describe proper management of wildlife resources in British Columbia, as it is almost 20 years old and may not represent relevant that exist today.

[61] Although I do not find all the evidence and argument provided by the Section Head to be persuasive, the fact remains that Ms. Hartnell's main purpose for the golden eagle is personal display, not ceremonial or societal uses. As a result, I conclude that she has not fulfilled the requirements to be permitted to possess or own the golden eagle under section 2(k)(ii) of the *Regulation* and, accordingly, I am not satisfied that the preconditions for granting a permit under section 5 of the *Regulation* have been met.

DECISION

[62] In reaching this decision, I have considered all of the evidence and submissions provided, even if I did not specifically reference it in my decision. The evidence and submissions summarized above were as necessary to give context to my decision.

[63] For the reasons set out above, the appeal is denied.

"Darrell LeHouillier"

Darrell LeHouillier, Chair
Environmental Appeal Board

October 11, 2019