

DECISION NOS. 2009-WIL-002(a)

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

BETWEEN: Pacific Northwest Raptors Ltd. **APPELLANT**

AND: Regional Manager **RESPONDENTS**

BEFORE: A Panel of the Environmental Appeal Board
Alan Andison, Chair

DATE: Conducted by way of written submissions
concluding on February 12, 2009

APPEARING: For the Appellant: Gillian Radcliffe
For the Respondents: Dick Heath

STAY DECISION

[1] Pacific Northwest Raptors Ltd. ("PNWR") has 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] In its Notice of Appeal, PNWR applied for a stay of the Regional Manager's decision, pending a decision by the Board on the merits of the appeal.

[3] This application has been conducted by way of written submissions.

BACKGROUND

[4] 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. PNWR has also been involved in the rehabilitation and transport of injured wild raptors for a number of years.

[5] PNWR holds a number of permits that authorize its activities, including a commercial falconry permit that permits free flying of certain birds, and an education permit respecting certain birds including a small number of non-releasable disabled birds. One of PNWR's permits authorizes it to possess and transport injured raptors for the purposes of short-term temporary rehabilitation, 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]

[6] The basis for this condition is a Ministry policy not to issue a person permits for both a rehabilitation permit and a commercial breeding permit, simultaneously.

[7] The Board has previously considered the merits of condition 11 in Appendix A of that permit. 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 condition¹.

[8] The following sequence of events 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 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 Sir Claws. On the application form, PNWR states the purpose for the permit, as follows:

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

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] With the permit application, PNWR provided to the Ministry a letter from Dr. Langelier. Dr. Langelier supports PNWR's permit application.

[11] By a letter dated December 12, 2008, but hand delivered to PNWR on December 21, 2008, the Ministry notified PNWR that it had to relocate the birds by December 19, 2008.

[12] On January 7, 2009, PNWR relocated all of the birds except Sir Claws to a bird rescue facility. PNWR has indicated that it did not relocate Sir Claws because it wanted to continue his rehabilitation and it was awaiting the Ministry's response to its permit application.

[13] 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]

[14] 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 by the Board on the merits of the appeal.

ISSUE

[15] The sole issue arising from this application is whether the Board should stay the refusal of PNWR's application, pending a hearing on the merits of the appeal. The Board's authority to grant a stay in an appeal under the *Wildlife Act* is derived from section 101.1(6), which provides:

An appeal taken under this Act does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

[16] In *North Fraser Harbour Commission et al. v. Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No, 97-WAS-05(a), June 5, 1997) (unreported), the Board concluded that the test set out in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) applies to applications for stays before the Board. That test requires an applicant to demonstrate the following:

1. There is a serious issue to be tried;
2. The applicant will suffer irreparable harm if the stay is not granted; and
3. The balance of convenience favours granting the stay.

[17] The onus is on the applicant to demonstrate good and sufficient reasons why a stay should be granted. The Board will address each aspect of the *RJR-Macdonald* test as it applies to the matter at hand.

DISCUSSION AND ANALYSIS

1. Serious Issue

[18] In *RJR MacDonald*, the Court stated that, as a general rule, unless the case is frivolous or vexatious or is a pure question of law, the inquiry as to whether a stay should be granted should proceed to the next stage of the test.

[19] The parties did not directly address this issue. However, the Panel has reviewed PNWR's grounds of appeal in order to determine whether there is a serious issue to be tried. The Panel notes that, although it is premature to decide the merits of the issues raised in the Notice of Appeal, the Panel can decide whether those issues are frivolous on their face.

[20] In the Notice of Appeal, PNWR states that it objects 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.

[21] The Regional Manager submissions on the stay application list a number of objections to the appeal, and summarize the arguments he intends to present at the appeal hearing. Many of the points he raises in his submission refute PNWR's claims that "free flying" techniques are appropriate for bald eagles. The Regional Manager argues that such techniques are not recognized as appropriate for bald eagles because their foraging habits are different from those of other raptors.

[22] In reply, PNWR submits that there is very little research available regarding the most appropriate rehabilitation techniques for bald eagles. It also argues that, although rehabilitation in flight pens provides some benefits to eagles, such pens do not provide a natural environment for eagles and provide extremely limited opportunities for eagles to develop hunting skills and exercise their flight muscles.

[23] The Panel finds that the appeal raises serious issues that should be decided by the Board based on full submissions by the parties. The issues raised by the appeal are neither frivolous nor vexatious, nor do they raise pure questions of law.

Based on the above considerations, the Panel finds that PNWR has demonstrated that there are serious issues to be decided in this appeal.

2. Irreparable Harm

[24] The second factor to be considered is whether PNWR will suffer irreparable harm if the stay is not granted. As stated in *RJR-MacDonald* at page 405:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

[25] In assessing claims of irreparable harm, the Panel is guided by the following statement in *RJR-MacDonald*:

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined.

[26] Although the parties did not directly address this issue, they have provided submissions that are relevant to this stage of the test.

[27] PNWR argues that denying a stay will result in a number of negative effects on Sir Claws, which are described above under issue #1, and will curtail the opportunity to learn things about eagle rehabilitation which could benefit other eagles in the future. In support of its submissions, PNWR provided letters from several people with experience in raptor rehabilitation.

[28] The Regional Manager submits that PNWR is operating outside of its existing permit authorizing short-term (two-week) rehabilitation of raptors. He maintains that NIWRC, a designated rehabilitation facility located in Comox, has the capacity to take Sir Claws and rehabilitate it using flight pen techniques that are more appropriate than the "free flight" technique used by PNWR.

[29] The Panel finds that the question of which technique is most appropriate for rehabilitating Sir Claws is one that goes purely to the merits of the appeal, and is a

complex question of fact that should be adjudicated based on a full hearing of the relevant evidence and submissions. Accordingly, the Panel finds that it would be inappropriate to draw conclusions on this question based on the submissions in this preliminary stay application.

[30] With respect to the existing requirement that PNWR is limited to short term rehabilitation of raptors, this Panel notes that, in *Pacific Northwest Raptors Ltd.*, the Board confirmed condition 11 in Appendix A 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.

[31] The submissions on the stay application have disclosed no *prima facie* reason for the Panel to conclude that this condition of the permit is no longer reasonable or justified in the circumstances.

[32] The Panel is satisfied that regardless of what form of rehabilitation is preferred for Sir Claws, the bird will not suffer irreparable harm during the period that the Board considers the merits of this appeal. Similarly, the Panel is also satisfied that PNWR will not suffer irreparable harm by being required to continue to operate its rehabilitation functions with injured birds on a short term basis while the matter is being adjudicated.

[33] For all of these reasons, the Panel finds that PNWR has not established that its interests will suffer irreparable harm if a stay is denied pending the outcome of its appeal.

3. Balance of Convenience

[34] At this stage of the test, the Panel must determine which of the parties will suffer greater harm from the granting of, or refusal to grant, the stay, pending a determination of the appeal on its merits.

[35] The Panel has already found that PNWR has failed to establish that it will suffer irreparable harm if the stay is denied, pending a decision on the appeal.

[36] Regarding the potential harm to the interests represented by the Regional Manager, the Panel notes that, at page 409 of *RJR-Macdonald*, the Court states:

In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[underlining added]

[37] Wildlife is a public resource in British Columbia, and officials within the Ministry, including, regional wildlife managers, are responsible for the proper management of that public resource. Section 2 of the *Wildlife Act* states that the ownership in all wildlife in the province is vested in the government, and a person does not acquire a right of property over wildlife, including a right to possess live wildlife, except in accordance with the provisions of the Act. Under section 19 of the *Wildlife Act*, a regional manager may issue permits, in accordance with the regulations, that authorize persons to do certain things that are otherwise prohibited by the Act. Under section 2(t) of the *Permit Regulation*, a regional manager may issue a permit authorizing a person to do certain things “for the purpose of rehabilitating wildlife”. Section 5 of that regulation creates certain preconditions for the issuance of a permit under section 2. In particular, section 5(1)(b) states:

- 5 (1) Before issuing a permit under section 2, 3 or 4 the regional manager or the director, as applicable, must be satisfied
- (a) that the applicant meets the specific requirements, if any, for the permit as set out in this regulation, and
 - (b) that issuing the permit is not contrary to the proper management of wildlife resources in British Columbia.

[underlining added]

[38] PNWR has not argued that the Regional Manager was not acting pursuant to his authority under the *Wildlife Act* when he denied PNWR's permit application. The Panel finds that the language in section 5(1)(b) of the *Permit Regulation*, together

with the principles stated in *RJR MacDonald* above, indicate that, when weighing the balance of convenience, the Panel should presume that a decision on an application for a rehabilitation permit under the *Permit Regulation* is *prima facie* consistent with the proper management of the province's wildlife resources, unless there is strong evidence to the contrary.

[39] The Panel acknowledges that PNWR's main grounds for appeal relate to whether the Regional Manager's decision is in the best interests of Sir Claws. However, the Regional Manager and PNWR disagree on the appropriate course of rehabilitation for Sir Claws, and without the benefit of a full hearing of the evidence and arguments on that question, the Panel is unable to conclude that the Regional Manager's decision is contrary to Sir Claws' best interests, or contrary to the proper management of wildlife resources in the province. Therefore, without the benefit of a full hearing of the merits of the Regional Manager's decision, and solely for the purpose of deciding this stay application, the Panel accepts that the Regional Manager's decision is *prima facie* consistent with the proper management of the province's wildlife resources, and is, therefore, in the public interest.

[40] The Panel finds that PNWR has not demonstrated that it will suffer any irreparable harm if a stay is denied. The Panel finds that any potential harm to PNWR's interests, if a stay is denied, do not outweigh the public interest in the continued application of the Regional Manager's decision.

[41] In these circumstances, the Panel finds that the balance of convenience favours denying the stay application.

DECISION

[42] In making this decision, the Panel has carefully considered all of the evidence before it, whether or not specifically reiterated here.

[43] For the above reasons, the application for a stay is denied.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

February 13, 2009