



Province of  
British Columbia

# Environmental Appeal Board

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## DECISION NO. 2006-WIL-013(a)

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

**BETWEEN:** Ritchey Elliott **APPELLANT**

**AND:** Assistant Director, Fish and Wildlife Branch **RESPONDENT**

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

**DATE:** August 10, 2006

**PLACE:** Richmond, BC

**APPEARING:** For the Appellant: Ritchey Elliott  
For the Respondent: Meghan McDermott

## APPEAL

Ritchey Elliott appeals certain provisions of the May 12, 2006 *Wildlife Act* permit (the "Permit") issued to him by Tom Ethier, Assistant Director of the Fish and Wildlife Branch (the "Assistant Director"), Ministry of the Environment (the "Ministry"). The Permit allows Mr. Elliott to capture and transport a combination of up to two immature northern goshawk, cooper's hawk, gyrfalcon or golden eagle from May 15, 2006 to January 15, 2007. The Permit states that Mr. Elliott may only capture 1 immature gyrfalcon as part of his 2 bird quota. The Permit also prohibits Mr. Elliott from capturing gyrfalcons in Wildlife Management Units 1-1 to 1-8, 2-4, 2-8, 6-28 and 6-29. Mr. Elliott appeals the prohibitions in relation to Management Units 1-1 to 1-8, 2-4 and 2-8 which are located within the Lower Mainland and on Vancouver Island.

The Environmental Appeal Board has the authority to hear this appeal under section 93 of the *Environmental Management Act*, and section 101.1 of the *Wildlife Act* (the "Act"). Section 101.1(5) of the *Act* provides that the 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.

Mr. Elliott requests that the Board reverse the Assistant Director's decision to prohibit him from capturing gyrfalcons in Management Units 1-1 to 1-8, 2-4 and 2-8, and to vary the Permit accordingly.

This appeal was conducted by way of an oral hearing.

## BACKGROUND

The evidence relevant to Mr. Elliott's appeal is as follows.

For the purpose of wildlife management, British Columbia has been divided into seven regions. Each region is further subdivided into Wildlife Management Units. The Management Units at issue in this appeal make up the southern half of Vancouver Island (Management Units 1-1 to 1-8) and the Lower Fraser Valley (Management Units 2-4 and 2-8).

Gyrfalcons are the largest falcons native to North America and breed primarily in the extreme northern areas of the continent, including northern British Columbia. Gyrfalcons winter on Vancouver Island and the Lower Fraser Valley. According to Campbell et al., authors of *The Birds of British Columbia*, (Vancouver: Mitchell Press, 1990) observations of gyrfalcons on Vancouver Island and the Fraser Lowlands are rare, with only 1 to 6 sightings reported on average per season.

Gyrfalcons are a type of raptor or raptorial bird. Raptorial birds include vultures, eagles, falcons, hawks, and owls. Raptors are considered "wildlife" as defined in the *Act*. Therefore, by virtue of section 2 of the *Act*, the government of British Columbia has ownership of all wild raptors and raptors captured in the wild in British Columbia. However, birds bred, hatched and raised legally in captivity or those legally taken in and imported from other jurisdictions are considered the property of the owner but their possession, use, transfer and export is subject to all applicable regulations and permits.

Falconers in British Columbia capture, captive-breed, and/or purchase raptorial birds for both recreational and commercial purposes. Recreational use of raptors includes hunting of waterfowl and rabbits. Raptors are used commercially for bird clearance at landfill sites, airports, and industrial sites.

Falconry is governed by the *Act* and the *Wildlife Act Permit Regulation*, B.C. Reg. 253/2000 (the "*Regulation*"). The Ministry's policy concerning raptorial birds is outlined in Volume 4, Section 7, Subsection 02.01 of the procedure manual of the Fish and Wildlife Branch (the "*Procedure Manual*"). The subsection is entitled Capture, Possession and Use of Raptorial Birds. According to the *Act* and the *Regulation*, falconers must have a permit to take, capture, possess, import, export or transport any live raptorial birds in British Columbia. The relevant process and considerations for issuing such permits is set out in the Procedure Manual.

Although Mr. Elliott is not a member of the British Columbia Falconers Association (the "BCFA"), many of B.C.'s falconers belong to the BCFA. According to Dennis Maynes, president of the BCFA, the association has approximately 30 members.

In approximately 2002, a Falconry Review Committee was established to review the Ministry's falconry policy and to address concerns raised by the BCFA. It consisted

of members of the BCFA and representatives of the Ministry, and was led by Elizabeth MacMillan, the then Manager of Wildlife Recreation and Allocation.

One of the policy changes sought by the BCFA through their participation in the Falconry Review Committee concerned the removal of the "southern boundary." The southern boundary was established in the 1990s and prohibited the capture of gyrfalcons south of the Trans Canada highway from Golden, through Kamloops, to Nanaimo. The BCFA was successful in obtaining the removal of this boundary as confirmed in a November 29, 2002 letter from Ms. MacMillan to the then president of the BCFA. In that letter, Ms. MacMillan advised that the policy concerning the closure of this [southern boundary] area to the capture of gyrfalcons had been reversed.

The BCFA has continued to consult with the Ministry regarding the government's policies concerning raptorial birds. In May of 2006, at the urging of the BCFA, the Assistant Director closed Management Units 6-28 and 6-29, which are located in the Haines Road Area of northern British Columbia, to the capture of gyrfalcons. Historically, this had been an area in which special interest or special opportunity licences for the capture of gyrfalcon had been issued. In an email to Mr. Maynes, sent May 3, 2006, the Assistant Director agreed to close this area and to issue 12 permits for the rest of the province outside of the Haines Road Area. The Ministry received 11 applications in 2006 for capture permits for gyrfalcon, including Mr. Elliott's.

Prior to the opening of the season for live raptor capture on May 15, the Assistant Director requested that Meghan McDermott, Wildlife Policy Analyst with the Ministry, consult with the Provincial Bird Specialist and regional wildlife biologists about prohibiting gyrfalcon capture in areas with dense human population.

On May 11, 2006, Ms. McDermott sent an email to the Regional Wildlife Biologists for Regions 1 and 2 advising that the closure of densely populated areas was being considered due to public relations concerns. In emails to Ms. McDermott, dated May 11, 2006, the Regional Wildlife Biologist for each region agreed that the closure of Management Units 1-1 to 1-8, and 2-4 and 2-8, respectively, were appropriate. All capture permits for gyrfalcons issued by the Ministry for the 2006 season reflect these recommendations.

Mr. Elliott lives in the Delta area of the Lower Fraser Valley. He is a falconer and has been practicing falconry since the 1960s. He currently has 12 captive-raised raptorial birds, including a mated pair of gyrfalcons. He does not have any wild raptorial birds. Mr. Elliott uses raptorial birds for both recreational and commercial purposes.

Mr. Elliott was granted a capture permit for gyrfalcons in 2005. The permit allowed Mr. Elliott to capture one immature gyrfalcon anywhere in British Columbia except Management Unit 6-28. Mr. Elliott spent 18 days attempting to capture a gyrfalcon in Management Unit 2-4 in 2005. In that time he captured one adult female gyrfalcon which he released. He did not spend any time capturing gyrfalcon in Management Units 1-1 to 1-8 or 2-8 in 2005.

On March 14, 2006, Mr. Elliott applied for a permit to capture a number of different species of raptorial birds, including gyrfalcons. His stated purpose for the birds was "used for bird clearance".

Mr. Elliott was granted the Permit on May 12, 2006 by the Assistant Director, pursuant to section 19 of the *Act*. However, as noted above, the Permit prohibits Mr. Elliott from capturing gyrfalcons in certain Wildlife Management Units; specifically, Management Units 1-1 to 1-8, 2-4, 2-8, 6-28 and 6-29. Mr. Elliott asks the Board to vary the Permit by removing the prohibition in relation to Management Units 1-1 to 1-8, 2-4 and 2-8 which are located in the Lower Mainland and on Vancouver Island.

The Assistant Director submits that his decision was justified and asks that the appeal be dismissed.

## **ISSUE**

This issue to be decided in this case is whether the prohibitions contained in Mr. Elliott's Permit against capturing immature gyrfalcons in Management Units 1-1 to 1-8 in Region 1, and in Management Units 2-4 and 2-8 in Region 2, are reasonable in the circumstances.

## **RELEVANT LEGISLATION**

Pursuant to section 2 of the *Act*, the government of British Columbia owns all wildlife in the Province.

### **Property in wildlife**

- 2** (1) Ownership in all wildlife in British Columbia is vested in the government.
- (2) A person does not acquire a right of property in any wildlife except in accordance with a permit or licence issued under this Act...

Section 29 of the *Act* generally prohibits a person from attempting to capture wildlife, unless that person has been authorized to do so. Section 29 states:

- 29** Except as authorized by this Act, the regulations or a permit, a person who attempts to capture wildlife commits an offence.

In this case, Mr. Elliott was authorized to capture the gyrfalcons by permit. The general permitting section in the *Act* is section 19:

### **Permits**

- 19** (1) A regional manager or a person authorized by a regional manager may, to the extent authorized by and in accordance with regulations made by the Lieutenant Governor in Council, by the issue of a permit, authorize a person
  - (a) to do anything that the person may do only by authority of a permit or that the person is prohibited from doing by this Act or the regulations, ...subject to and in accordance with those conditions, limits and period or periods the regional manager may set out in the permit and, despite

anything contained in this Act or the regulations, that person has the authority during the term of the permit.

More detailed permitting sections are found in the *Regulation*. Sections 2 and 5 are relevant to this case and provide as follows:

### **Authorization by permit**

2 A regional manager may issue a permit in accordance with this regulation on the terms and for the period he or she specifies

...

(h) authorizing a person to capture live wildlife,

...

### **Restrictions on issuing permits generally**

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.

When the Assistant Director issued the Permit in this case, he was exercising the permitting powers of a regional manager. This power was exercised under the authority of section 100(1) of the *Act* which states:

**100** (1) In addition to other powers given under the Act, the director may do an act or thing that a regional manager is empowered to do.

## **DISCUSSION AND ANALYSIS**

### **Whether the prohibitions contained in Mr. Elliott's Permit against capturing immature gyrfalcons in Management Units 1-1 to 1-8 in Region 1, and in Management Units 2-4 and 2-8 in Region 2, are reasonable in the circumstances.**

Mr. Elliott submits that the Assistant Director's decision to close the Management Units at issue is without merit. Specifically, he argues that there is no foundation for the belief that the capture of gyrfalcon in these areas could lead to public relations problems such as confrontations between wildlife viewers and those with permits to capture raptors. Mr. Elliott submits that the trapping of gyrfalcons has been allowed in the Management Units in question for the past three years and there is no record of confrontations between birdwatchers and those permitted to capture raptors. Furthermore, according to Mr. Elliott, the areas at issue remain open for the capture of other raptors, such as Golden Eagles, which are far larger and more easily viewed than the gyrfalcon.

Mr. Elliott notes that the "southern boundary" was removed by Ms. MacMillan in 2002. He submits that this policy was reflected in Mr. Elliott's 2005 permit in which none of the Management Units at issue in this appeal were closed. Furthermore, in

the Assistant Director's May 3, 2006 email to Mr. Maynes, the Assistant Director stated that he would accommodate the preferences of the BCFA for closure of the Haines Road Area in favour of 12 permits issued for the province outside of the Haines Road Area. Mr. Elliott submits that southern Vancouver Island and the Lower Fraser Valley should therefore be open for the capture of gyrfalcons.

The Assistant Director submits that his decision to close the areas at issue is justified. He submits that in making his decision, he sought to balance the interests of a small group of falconers with the bird viewing opportunities of the general public. He submits that due to the infrequency of sightings of gyrfalcon on southern Vancouver Island and in the Lower Fraser Valley, viewing opportunities in those areas are particularly unique and should be preserved.

The Assistant Director submits that the areas at issue have dense human populations and, therefore, the potential for conflict between wildlife viewers and those wishing to capture raptorial birds is significant. The Assistant Director submits that his concerns about possible conflict between the interests of falconers and wildlife viewers who want raptors to remain wild, is based on public response to a 2004 article published in the *Vancouver Sun*. The article concerned the Ministry's consideration of a consultant's report recommending the deregulation of falconry in British Columbia. The Ministry received at least 20 letters from citizens of British Columbia opposed to the capture of live raptors. The article and these letters were provided to the Panel.

The Assistant Director further submits that his decision was made in accordance with the Procedure Manual. Subsection 3.5 of the section of the Procedure Manual concerning live raptor capture states:

The capture of any species for any purpose will not be permitted where the Chief of Wildlife determines that such capture may cause a serious decline in the population or *where such capture is determined to be destructive of other and higher benefits and uses*. [emphasis added]

The Assistant Director submits that the opportunity to view live gyrfalcon in densely populated regions is of higher benefit and use than the capture of these birds by falconers.

In response to Mr. Elliott's submissions concerning the decision to remove the "southern boundary," the Assistant Director submits that he is not bound by the decision made by Ms. MacMillan. The Assistant Director provided a June 10, 2005 letter to Mr. Maynes from Nancy Wilkin, Assistant Deputy Minister of Environmental Stewardship for the Ministry, advising that the deliberations of the Falconry Review Committee were never formalized as official Ministry policy. The letter states:

I understand that several issues were "agreed to" by the Falconry Review Committee. This committee was not in a position to be the final decision-making body on falconry issues, nor was there an agreement that decisions made at that table would be considered final. Such decisions must be approved by decision-makers at several stages before being finalized.

The Assistant Director further submits that his May 3, 2006 email to Mr. Maynes was to notify Mr. Maynes, and the BCFA, of his decision concerning the Haines Road Area. It was not a guarantee that the rest of the province would be open for gyrfalcon capture.

Based on the evidence before the Board, the Panel finds that the prohibitions in the Permit against capturing immature gyrfalcons in Management Units 1-1 to 1-8 in Region 1, and in Management Units 2-4 and 2-8 in Region 2, are reasonable in the circumstances. There are a number of reasons for this finding.

When issuing a permit, the Assistant Director must be satisfied that the requirements of section 5 of the *Regulation* are met. In particular, that "issuing the permit is not contrary to the proper management of wildlife resources in British Columbia." As stewards of the wildlife resource, the government has determined that preserving birds in the wild in order to facilitate viewing by the public is a legitimate and beneficial use of the wildlife resource, and is, therefore, a valid objective of wildlife management. The Panel agrees. The question is whether this objective should have been preferred in the Management Units at issue over Mr. Elliott's interest in attempting to capture a gyrfalcon in those same areas.

It is clear on the evidence that the opportunity to see a gyrfalcon in the wild, in the subject areas, is limited. Mr. Maynes estimated that there are approximately 50 to 100 gyrfalcons on Vancouver Island and in the Lower Fraser Valley. The authors of *The Birds of British Columbia*, state that there are only 1 to 6 sightings of gyrfalcon in these areas per season.

The Panel accepts that there are gyrfalcons that winter on Vancouver Island and in the Lower Fraser Valley. The actual number is not known, but what is evident is that these birds are not numerous and the opportunity to view them is limited. Every time one of these birds is captured by a falconer the chances of seeing one of these birds in the wild becomes progressively more remote.

It is also clear that there are significantly more birdwatchers in these areas, than falconers. Mr. Maynes estimated that there are "thousands" of birdwatchers and wildlife viewers in southern Vancouver Island and in the Lower Fraser Valley. Conversely, while not all falconers in British Columbia are members of the BCFA, its small membership (30) is indicative of the limited participation in falconry in British Columbia. With large numbers of birdwatchers keen to experience such a rare sighting of a gyrfalcon, it is not unreasonable for the Assistant Director to be concerned about the potential for conflict and/or complaints from birdwatchers because these birds are being captured and removed from the wild.

In making his decision, the Assistant Director only closed those areas in British Columbia which have dense human population, leaving the rest of the Province open to gyrfalcon capture. In the Panel's view, this decision reflects a reasonable compromise given the competing interests of birdwatchers and falconers in the wildlife resource, and taking the composition of both interested groups into account in terms of numbers and location. The Panel agrees with the Assistant Director that closing Management Units 1-1 to 1-8, 2-4 and 2-8 strikes the necessary balance between these groups and their competing interests.

Furthermore, in making his decision, the Assistant Director acted in accordance with the Procedure Manual. Although the evidence suggests that the Procedure Manual is not up to date and has not always been followed in recent years, this does not mean that the Procedure Manual carries no weight or that the Assistant Director is bound by the decisions of his predecessor, Ms. MacMillan. Ms. MacMillan's decision regarding the "southern boundary" was not adopted as formal policy by the Ministry. The Assistant Director must exercise his discretion in a reasonable manner. Since policy is not binding, nor are the decisions of previous Ministry employees, he is free to adopt or reverse that policy.

Finally, the Panel notes that, despite his challenge to the closures of ten Management Units, Mr. Elliott's evidence is that his activities under past permits have been limited to Management Unit 2-4. Further, even if allowed to capture an immature gyrfalcon in Management Units 1-1 to 1-8, he testified that he would not do so. Thus, the prohibitions in Management Units 2-8 and 1-1 to 1-8 have a minimal impact on him.

In consideration of all of these factors, the Panel finds that the prohibitions at issue in this appeal are reasonable conditions of the Permit and there are no special circumstances that warrant removing the prohibitions on the evidence provided in this case.

## **DECISION**

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

For the above reasons, the Permit as issued is confirmed and the appeal is dismissed.

"Alan Andoson"

Alan Andison, Chair  
Environment Appeal Board

September 28, 2006