

SUPREME COURT OF NOVA SCOTIA

Citation: Palmer v. Nova Scotia (Natural Resources), 2011 NSSC 248

Date: 20110620

Docket: Hfx No. 347345

Registry: Halifax

Between:

Mark Palmer, as Guardian *ad Litem* for his daughters

Applicant

v.

Department of Natural Resources
for the Province of Nova Scotia

Respondent

Judge: The Honourable Justice Glen G. McDougall

Heard: June 14, 2011, in Halifax, Nova Scotia

Oral Decision: June 20, 2011

Written Decision: June 24, 2011

Counsel: Mark Palmer, on his own behalf and as Guardian *ad Litem* for his daughters, Samantha and Allison
Darlene Willcott, on behalf of Nova Scotia Department of Natural Resources

By the Court [orally]:

[1] This is an application in chambers brought by Mark Palmer both for himself and his two daughters, Samantha and Allison, who are respectively eight and five years-of-age. Henceforth I will refer to them as (the “Applicants”). The Respondent, Nova Scotia Department of Natural Resources is represented by the Province’s Attorney General. I will henceforth refer to the Department of Natural Resources as (the “DNR”).

[2] The Applicants seek an order for the return of a turtle found in a ditch by the side of the road near Wynacht's Point, Nova Scotia, on the afternoon of March 6, 2011.

[3] The turtle, which was later identified as a Florida Red-Bellied Cooter, was first spotted by Mr. Palmer's wife, Tabitha Palmer. It was upside-down and by all accounts was likely to succumb to the elements if left in the wild.

[4] The Florida Red-Bellied Cooter is not native to Nova Scotia. It is indigenous to the State of Florida and some other adjoining southeastern States of the United States of America. While the origin of this particular turtle – named "Leaf" by Mr. and Mrs. Palmer's two daughters – is not known, it was likely brought to Nova Scotia illegally and either released into the wild or else escaped from captivity.

[5] For many years, it has been the policy of the DNR not to issue captive wildlife permits for turtles to members of the public. I reference para. 8 of the affidavit of Dr. Sherman Boates, Ph. D., filed in support of the Respondent's position:

8. However, for many years, it has been the policy of DNR not to issue captive wildlife permits for turtles to the public. The key rationale for not issuing captive wildlife permits for turtles rest on both conservation concerns and human health concerns.

[6] The rationale for this policy is due to a concern that non-indigenous turtle species "could harbor disease or transfer harmful organisms that could impact our native species or ecosystems. Dr. Boates states at para 10 of his affidavit:

10. It is a concern of DNR that turtles not indigenous to Nova Scotia could harbor disease or transfer harmful organisms that could impact our native species or ecosystems.

[7] It is also out of concern for human health Dr. Boates states in para 12 of his affidavit:

12. Salmonella in turtles is a very serious human health concern, especially for children. The sale of turtles have been illegal under the Nova Scotia *Health Protection Act* for years due to concerns of salmonella.

[8] After finding the turtle, the Palmers and their daughters rescued it from the roadside ditch and took it home to try to nurse it back to health.

[9] In order to accurately identify its species, Mr. Palmer contacted the Nova Scotia Museum and made arrangements to have the turtle dropped off for examination by Mr. John Gilhen, Curator Emeritus and Herpetologist.

[10] Mr. Palmer relinquished possession of the turtle for identification purposes only. He never intended to cede ownership but recognized that he and his daughters might have to if the turtle was found to be a member of an endangered species. The form signed by Mr. Palmer when he handed over the turtle to Mr. Gilhen on March 17, 2011 clearly indicated that Mr. Palmer wanted it returned “if possible.” These last two words were inserted by Mr. Palmer prior to signing the form. In completing the form, Mr. Palmer had to change the tick mark that Mr. Gilhen had previously made to the “No” box next to the question “Do you want the specimen / artifact returned?” He changed it by ticking off the “Yes” box and inserting the two words referred to above.

[11] After examination of the turtle, Mr. Gilhen, instead of returning it to Mr. Palmer, sent it to the Biology Department at St. Mary’s University. Apparently Mr. Gilhen had contacted the DNR and was told to euthanize the animal. He, instead, sent it to one of the professors at St. Mary’s.

[12] When Mr. Palmer found out the turtle had been sent to St. Mary’s University he attempted to retrieve it. He spoke to Dr. Adam Sarty, Acting Assistant Dean of Science and to Dr. Ron Russell. He demanded the return of his property.

[13] The DNR had ordered St. Mary’s to euthanize the turtle and, not wanting to risk any conflict with DNR officials, a St. Mary’s University staff member contacted the DNR and requested they drop by to seize possession of the turtle. This was done and the turtle was taken to the Shubenacadie Wild Life Park where it was treated for various health issues. It is being cared for pending a resolution of this matter in Court. It is uncertain if the turtle will even survive given the ailments it has been diagnosed with.

ISSUE:

[14] The issue before this Court pertains to ownership. Specifically, are Mr. Palmer and his two daughters the rightful owners of the turtle that was found in the wild?

[15] Ownership of wildlife is dealt with specifically in the *Wildlife Act*, R.S.N.S., 1989, c. 504 (hereinafter referred to as the “*Act*”). Subsection 4(1) states:

Ownership of wildlife

4 (1) Subject to subsection (2), the property in all wildlife situate within the Province, while in a state of nature, is hereby declared to be vested in Her Majesty in right of the Province and no person shall acquire any right or property therein otherwise than in accordance with this Act and the regulations.

[16] Black’s Law Dictionary, Ninth Ed., defines ownership as follows:

The bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others. • Ownership implies the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent, and heritable.

The definition in Black’s Law Dictionary, Ninth Ed., includes the following by way of explanation:

Possession is the *de facto* exercise of a claim; ownership is the *de jure* recognition of one. A thing is owned by me when my claim to it is maintained by the will of the state as expressed in the law; it is possessed by me, when my claim to it is maintained by my own self-assertive will. Ownership is the guarantee of the law; possession is the guarantee of the facts. It is well to have both forms if possible; and indeed they normally co-exist.” John Salmond, *Jurisprudence* 311 (Glanville L. Williams ed., 10th ed. 1947).

This helps to explain the difference between ownership and possession.

[17] The Applicants argue that the turtle ceased to be “in a state of nature” at the moment they took possession of it. Furthermore, they argue that the definition of wildlife in the *Act* is far too broad and hence too vague for enforcement. “Wildlife” is defined in section 3, subsection (1), paragraph (ba) of the *Act* to mean:

Interpretation

3 (1) In this Act,

(ba) "wildlife" means vertebrates that, in their natural habitat, are usually wild by nature and includes

- (i) domestic organisms that are physically similar to their wild counterparts,
- (ii) exotic wildlife,
- (iii) hybrid descendants of wildlife or of wildlife and a domestic organism,
- (iv) the eggs, sperm or embryos of wildlife, and
- (v) any other organism designated as wildlife by the Governor in Council in accordance with this Act and the regulations;

[18] Counsel for the Attorney General as agent for DNR argues that the *Act* is clear. The turtle, which is the subject of this litigation is included in the definition of wildlife and that it fits the definition of exotic wildlife and exotic wildlife is specifically included in that definition.

[19] Section 3, subsection (1), paragraph (q) defines "exotic wildlife" to mean:

Interpretation

3 (1) In this Act,

(q) "exotic wildlife" means all birds, mammals and other vertebrates that are not indigenous to the Province and that in their natural habitat are usually wild by nature, and includes any part of such birds, mammals or other vertebrates;

[20] Ms. Willcott, counsel for DNR, urged the Court to follow the oft-expressed modern principle of statutory interpretation. This modern principle has been described in "Sullivan on the Construction of Statutes" as follows:

Today there is only one principle or approach, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

She further urges the Court to follow the wisdom of the text in this particular instance since the wording of the *Act* is clear and unambiguous.

If the text is precise and is addressed to a specialized audience that would understand it in a certain way and reasonably rely on that understanding, then the apparent meaning of the text appropriately receives significant weight. If the consequences of ejecting that meaning would create harmful uncertainty, it appropriately receives greater weight.

She further refers the Court to **Canada Trustco Mortgage Co. v. Canada**, 2005 SCC 54, at para 10:

10 ... The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the *Act* as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words play a lesser role.

[21] In interpreting the *Act*, the Court should also look at the object and purpose of the *Act* as stated in section 2. Included in this section are the following:

Object and purpose

2 The object and purpose of this Act is to

(a) develop and implement policies and programs for wildlife designed to maintain diversity of species at levels of abundance to meet management objectives;

...

(c) provide for the regulation of hunting and fishing and the possession and sale of wildlife; and

[22] Ms. Willcott also pointed to the *Prevention of Salmonella Infection by the Control of the Sale of Turtles Regulation*, passed pursuant to the *Health Protection Act*, S.N.S. 2004, c. 4, which states:

1 Except as provided in Section 2, no person shall sell turtles of any kind or genera.

2 Section 1 shall not apply to the sale of turtles to zoos, universities, or other post secondary educational institutions or to such other persons as the Deputy Minister of Health may authorize.

[23] Dr. Sherman Boates in his affidavit stated that no import permit or captive wildlife permit has been applied for or granted in respect of the turtle in question. In a question put to the other affiant, Mr. Robert Petrie, the Director of Wildlife for the Nova Scotia Department of Natural Resources who just happened to be in attendance at the Court hearing, he indicated that even if such a permit or permits had been requested it would not likely have been granted. No doubt this would be the case and for good reason. Dr. Boates, at paras. 9 and 10 of his affidavit had this to say:

9. There is a conservation concern for three or four native species of turtle in the Province of Nova Scotia. Blanding's turtle is endangered. The wood turtle is threatened and/or vulnerable and the snapping turtle is a special concern.
10. It is a concern of DNR that turtles not indigenous to Nova Scotia could harbor disease or transfer harmful organisms that could impact our native species or ecosystems.

[24] This is in keeping with the stated object and purpose of the *Act* referred to earlier.

DECISION:

[25] Giving the legislation an interpretation consistent with its overall objective while avoiding an absurd result, I conclude that the turtle found by Mrs. Palmer in the wild is "wildlife" as defined by the *Act*. Its temporary removal from the wild does not alter its usual status of being "wild by nature".

[26] The *Act*, specifically section 4, subsection (1), is clear and unequivocal in vesting "the property in all wildlife situate within the Province, while in a state of

nature, in Her Majesty in “right of the Province.” The only exception is for a person “who lawfully kills wildlife and complies with all applicable provisions of this *Act* and the *Regulations*.” That exception has no relevance to this application.

[27] I commend the Palmer family for their efforts to save and preserve this turtle. And, while I have no doubt that they would live up to their commitment to keep the animal in captivity as best they could, this does not override or displace the Province’s rightful ownership of the creature.

[28] In order to safeguard the viability of the indigenous turtle species in this Province, the extra-Provincial turtle that is the subject of this application cannot and should not be returned to the Applicants. It is up to those who currently have the possession, ownership, and not just the legal authority, but also the responsibility pursuant to the *Act* and its *Regulations*, to decide whether the turtle should be held or disposed of in some humane fashion. While I do not encourage the killing of any living creature, the sacrifice of one for the protection and preservation of other indigenous species sometimes cannot be avoided.

[29] The Crown has requested that costs be awarded. Normally the successful party is entitled to costs. However, given the circumstances of this case and considering what motivated it, I choose to exercise my discretion to order each side to bear their own costs. Ms. Willcott will prepare the Order dismissing the application without costs.

McDougall, J.