



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *R. v. Turnbull*, 2016 NLCA 25

Date: June 6, 2016

Docket: 201501H0017

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

DARRELL KIRBY TURNBULL

RESPONDENT

AND:

ATTORNEY GENERAL OF CANADA

INTERVENOR

Coram: Welsh, Rowe and White JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador

Appeal Heard: May 12, 2016

Judgment Rendered: June 6, 2016

Reasons for Judgment by Rowe J.A.

Concurred in by Welsh and White JJ.A.

Counsel for the Appellant: Frances Knickle Q.C.

Counsel for the Respondent: Self Represented

Counsel for the Intervenor: Patricia MacPhee

Rowe J.A.:

[1] On March 16, 2012, Darrell Turnbull traveled by snowmobile from his home in Charlottetown, Labrador, with his wife and young daughter to their cabin in nearby Seal Cove. When they arrived, they found that the cabin had been considerably damaged by a bear. Mr. Turnbull made temporary repairs and he and his family settled into the cabin.

[2] Next day, Mr. Turnbull went hunting for birds. He returned to find a polar bear again “tearing up” the cabin. The polar bear left, then began to return again. Mr. Turnbull feared for the safety of his family. Mr. Turnbull fired “warning shots”, but the polar bear kept coming. Mr. Turnbull started his snowmobile. By now the bear had veered off, away from the cabin. Mr. Turnbull followed the bear onto the sea ice. With two shots, he killed the bear. He hauled the bear a short distance to an island. He did not attempt to take or claim any part of the bear.

[3] Mr. Turnbull promptly reported what he had done to wildlife officers. He was charged under section 28 of the *Wild Life Act*, RSNL 1990, c.W-8 for killing the bear without having a permit to do so.

[4] The Crown negotiated a plea bargain with Mr. Turnbull who was unrepresented. However, at the hearing (in October 2013) when Mr. Turnbull said that he had acted in self defence, the Provincial Court judge refused to accept his guilty plea. The trial then proceeded on the basis of a statement of agreed facts, including where the bear was shot and killed.

[5] At the conclusion of the Crown’s case, Mr. Turnbull testified as to the facts set out in paragraphs 1-3.

[6] The judge questioned Mr. Turnbull who testified, *inter alia*, that he had a VHF radio and a satellite phone with which he could have contacted persons in Charlottetown. During cross-examination by Crown counsel, Mr. Turnbull testified that before shooting the bear, he had pursued the bear for 10 minutes and for a distance (ascertained from maps received in evidence) of 1.7 kilometers.

[7] Following Mr. Turnbull’s testimony, the judge raised two constitutional issues: first, when the bear was shot was it within the territorial jurisdiction of the province; and, second, is regulation of the hunting of polar bears within provincial or federal jurisdiction? The judge gave Crown counsel time to make submissions on these issues, then

proceeded to hear submissions as to whether Mr. Turnbull had a defence based on his conduct (the due diligence defence).

[8] The record for October 30, 2014 (i.e. about a year after the hearing at which Mr. Turnbull testified), while incomplete, refers to “cases” tendered by the Crown, as well as the judge doing his “own research”.

[9] On February 20, 2015, the judge rendered his decision. He acquitted Mr. Turnbull on the basis that:

- (1) polar bears are marine mammals and, as such, fall under exclusive federal jurisdiction;
- (2) the bear was shot on the sea ice in an area outside the territory (and, thus, the jurisdiction) of the province; and
- (3) Mr. Turnbull had exercised “reasonable diligence” and, therefore, aside from (1) and (2), he had a defence against the charges.

[10] The Crown in right of the Province appealed the judge’s decision. The Crown in right of Canada sought and was granted intervenor status on the constitutional questions.

ISSUES

[11] The issues in this appeal include:

- (1) the failure to provide proper notice to the Crown in right of Canada of the constitutional issues;
- (2) did the judge err as regards jurisdiction over polar bears;
- (3) did the judge err as regards which level of government has territorial jurisdiction over the place where the bear was shot;
- (4) did the judge err in the legal test that he applied in concluding that Mr. Turnbull had a due diligence defence; and
- (5) if the judge erred regarding (4), then on the application of the proper test, should Mr. Turnbull be acquitted based on the defence of due diligence?

ANALYSIS

Notice of Constitutional Question

[12] In *Newfoundland (Workplace Health, Safety and Compensation Commission) v. Ryan Estate*, 2011 NLCA 42, 308 Nfld. & P.E.I.R. 1, (the *Ryans Commander* case) this Court dealt with the requirement under the *Judicature Act* for notice of a constitutional question. The majority stated:

[19] Subsection 57(1) [of the *Judicature Act*, RSNL 1990, c. J-4] provides:

Where in a proceeding the constitutional validity of an Act or regulation of the Parliament of Canada or of the Legislature is brought into question, it shall not be heard until notice has been given to the Attorney General for Canada and to the Attorney General for the province. [emphasis added]

[13] In this case, the validity of provincial subordinate legislation was called into question, including the *Open Season Big Game Polar Bear Hunting Order, Labrador*, NLR 26/07, made under the authority of sections 39 and 114 of the *Wild Life Regulations*, CNLR 1156/96 and the *Wild Life Act*. The Order, *inter alia*, prohibits “the taking of polar bears ... throughout Labrador except as provided for in this Order”. Such an Order can be valid only if hunting polar bears is a matter within provincial jurisdiction.

[14] Thus, under the test set out in *Ryans Commander*, notice of a constitutional question was required under subsection 57(1) of the *Judicature Act*. Ordinarily it would be the responsibility of counsel for the accused to give notice where the constitutional question was raised for his benefit; however, as a self-represented party, it was not surprising that Mr. Turnbull was unaware of the requirement of subsection 57(1) of the *Judicature Act*.

[15] In the circumstances of this case, where the constitutional issue was raised by the judge, before proceeding, he should have ensured that proper notice was given as required under the *Judicature Act*. It would be expected that Crown counsel would assist in such a situation by preparing and serving a notice of constitutional question on the Attorney General of Canada. Because Crown counsel in this case represented the Attorney General of the Province, separate notice to the provincial Attorney General was not necessary.

[16] Failure to give notice to the Attorney General of Canada had significant practical consequences. The Crown in right of Canada had no

opportunity to make its legal submissions, nor to place before the provincial court materials in support of its submissions. This led to the trial judge rendering a decision more in the nature of an essay, rather than as a reasoned judgment grounded in the operation of the adversarial system and based on evidence.

[17] That said, the Crown in right of Canada subsequently sought and was granted intervenor status. This Court has the Attorney General of Canada's submissions on the two constitutional issues. Federal Crown counsel indicated that, in fact, the Attorney General of Canada agrees that the provincial legislature has jurisdiction to regulate the hunting of polar bears as set out in the *Wild Life Act*, the *Regulations* and the Order. If there had been any party arguing to the contrary, she would have applied to adduce expert evidence regarding the nature of polar bears to demonstrate that they are not marine mammals. This fact further emphasizes that the trial judge had a responsibility to ensure that the adversarial system operated with the parties having the opportunity to adduce evidence, and with both Attorneys General having notice so that the constitutional issue could be properly adjudicated. This was not a situation where the trial judge was in a position to take judicial notice of, or conduct his own research regarding the nature of polar bears.

[18] That said, given that no party was challenging provincial jurisdiction over the regulation of the hunting of polar bears, as discussed below, in these particular circumstances, the Court accepted the submissions of counsel for both Attorneys General that the appeal should proceed on the record. I emphasize that this is an unusual situation since, generally, this Court would not proceed in the absence of a record providing a complete foundation relevant to consideration of the constitutional issue.

Jurisdiction over Hunting Polar Bears

[19] At paragraph 32 of his decision, the trial judge states:

Canada has sole constitutional jurisdiction over [oceanic] fish and marine mammals ... such as whales, walruses and seals.

[20] The trial judge relied on his own research to conclude that polar bears are also "marine mammals". In reaching this conclusion he relied on two factors:

- the latin name is *ursa maritimus*, literally marine bear; and

- polar bears spend much of their life on sea ice, from which they hunt their main food source, seals.

[21] Based on this, the judge concluded (at paragraph 40 of his decision):

Polar bears, in pith and substance, are marine mammals and fall exclusively under the jurisdiction of the federal government, and, therefore under the jurisdiction of Fisheries and Oceans Canada which is charged with responsibility for fish and marine mammals, such as whales, walrus and seals.

[22] The trial judge's approach and, therefore, his conclusion do not withstand scrutiny. As set out above, the difficulty arises from the judge conducting his own research in the absence of submissions from the Attorney General of Canada.

[23] Counsel for the federal Crown in this Court took the position that the presumption of constitutionality applies; that is, in the circumstances, since both Attorneys General took the position that the province has jurisdiction over the regulation of the hunting of polar bears, the legislation should be presumed to be constitutionally valid. In the alternative, counsel for the federal Crown took the position that, if the presumption of constitutionality does not apply, the matter must be remanded for a new trial to give the Crown the opportunity to adduce evidence.

[24] In *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, Major J., for the Court, made reference to the presumption of constitutionality:

[33] In making this determination, I am mindful of the presumption of constitutionality recognized in *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, at p. 255; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at pp. 687-88; *Re Firearms Act*, *supra*, at para. 25. When faced with two plausible characterizations of a law, we should normally choose that which supports the law's constitutional validity.

[25] For purposes of this case, this principle must be considered in light of the fact that the regulation of hunting within the province has been held to fall within provincial jurisdiction. In *R. v. Felawka*, [1993] 4 S.C.R. 199, Cory J., for the majority, discussed the effect of different uses of firearms and, with respect to hunting, he wrote, at page 216:

... At the same time, provincial regulations pertaining to hunting with firearms are within the purview of the provinces as matters of local interest (s.

92(16) of the *Constitution Act, 1867*) or as matters of property or civil rights (s. 92(13)) as noted by La Forest J.A. (as he then was) in *R. v. Chiasson* (1982), 135 D.L.R. (3d) 499, affirmed [1984] 1 S.C.R. 266.

[26] In light of all these considerations, and in the absence of a party challenging the constitutional validity of the *Wild Life Act*, the *Regulations* and the Order, for purposes of this appeal, I am satisfied to accept that Mr. Turnbull was subject to the application of those provisions, provided that he shot the polar bear within the territorial jurisdiction of the province.

Territorial Jurisdiction

[27] Provinces do not have constitutional authority to legislate extra-territorially; *Unifund Assurance Co. of Canada v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63 and *British Columbia v. Imperial Tobacco*, 2005 SCC 49, [2005] 2 S.C.R. 473. Thus, even if the provincial wildlife legislation under which Mr. Turnbull was charged is *intra vires* the province, its operation is confined to the territorial limits of the province.

[28] The trial judge wrote extensively on the continental shelf, the territorial sea, internal waters and inland waters. On the facts of this case, what is relevant is inland waters. I will not comment on the accuracy of the judge's general statements concerning these matters. Rather, I will highlight a critical factual point.

[29] From maps placed in evidence, it is clear that Mr. Turnbull killed the bear on ice that was within inland waters, that is waters that are within the territory of the province. Inland waters include "harbours, bays, estuaries and other waters lying between the jaws of the land"; *R. v. Roff* (1996), 146 Nfld. & P.E.I.R. 87 (Nfld. C.A.) and *Reference re: Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 S.C.R. 388. The finding by the trial judge (in para. 145 of his decision) that the bear was shot outside inland waters constitutes a palpable and overriding error, as it is clearly contrary to the evidence and plainly wrong.

Due Diligence: The Correct Test?

[30] The offences with which Mr. Turnbull was charged under the *Wild Life Act* are strict liability offences as defined in *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299. As a strict liability offence, the onus is on the Crown to prove beyond a reasonable doubt that the accused committed the *actus*

reus. It is then open to the accused to avoid liability by showing on a balance of probabilities that he exercised due diligence. See *R. v. Wholesale Travel Group*, [1991] 3 S.C.R. 154.

[31] The Supreme Court in *Sault Ste. Marie* described the due diligence defence at p. 1326:

... by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event [emphasis added].

[32] The trial judge erred in applying the wrong burden of proof in relation to the defence of due diligence. Rather than stating that the accused needed to establish the defence on the balance of probabilities, in para. 157 of his decision the judge said that it was sufficient for the accused to raise a reasonable doubt in order to make out the defence. This was an error in law that fatally undermines the judge's conclusion that Mr. Turnbull had established the defence of due diligence.

Due Diligence

[33] It is now for this Court, based on the facts as found by the trial judge concerning Mr. Turnbull's conduct, to decide whether the accused had established the defence of due diligence. I conclude that he did.

[34] Mr. Turnbull feared for the safety of his family. The polar bear had on two occasions damaged the cabin where he and his family were staying. Warning shots did not initially turn back the bear when the bear was yet again advancing toward the cabin. It is true, as the Crown emphasizes, that by the time that Mr. Turnbull had started his snowmobile, the bear had veered off and was moving away from the cabin. But for how long? When would the bear return, as it seemed likely to do? In the middle of the night? While Mr. Turnbull was away and his wife and daughter were in or around the cabin and defenceless? Each such case must be carefully considered on its facts. In the circumstances of this case, Mr. Turnbull acted reasonably and with due diligence to protect his family. It is unfortunate that meant killing the polar bear.

CONCLUSION

[35] I would dismiss the appeal and affirm the acquittal, albeit for reasons different from those of the trial judge.

M. H. Rowe J.A.

I Concur: _____

B. G. Welsh J.A.

I Concur: _____

C. W. White J.A.