

Editors' note: Memorandum released August 06, 2009. Original judgment has been corrected, with text of memorandum appended

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Maynes v. British Columbia (Environment)*,
2009 BCSC 1066

Date: 20090805
Docket: X072385
Registry: New Westminster

Between:

Dennis Maynes and Margaret Maynes

Appellants

And

**The Minister of the Environment for the
Province of British Columbia**

Respondent

Corrected Judgment: Date of Judgment on front page has been corrected on
August 6, 2009

Before: The Honourable Madam Justice Gropper

On Appeal from Provincial Court of B.C., decision dated September 22, 2008,
Docket No. 163944-1

Reasons for Judgment

Counsel for Appellants: M. Campbell

Counsel for Respondent: E. Ross

Place and Date of Trial/Hearing: New Westminster, B.C.
April 16, 2009

Place and Date of Judgment: New Westminster, B.C.
August 5, 2009

I. Introduction

[1] Dennis Maynes is a falconer. He held the appropriate permit in accordance with the *Wildlife Act*, R.S.B.C. 1996, c. 488 [*Act*] and *Regulations* until March 31, 2007, authorizing him to possess, transport, and traffic raptors that were legally held captive in B.C. for recreational and commercial falconry. Conditions of such a permit included various reporting requirements.

[2] In 2007, Mr. Maynes reported he possessed only one raptor, a bald eagle born in the wild. As other raptorial owners had reported Mr. Maynes as both the source and destination for raptors during the 2006/2007 period, the Ministry of the Environment commenced an investigation. Mr. Maynes denied the opportunity provided to him by the Ministry to report any of his captive-bred raptors and thus was advised by the Ministry to cease all raptor activity as he was currently operating without a permit contrary to the *Act*.

[3] On November 1, 2007, a conservation officer for the Ministry attended at Mr. Maynes' commercial premises. Mr. Maynes admitted to working with the raptors without a permit authorizing him to possess, transport, and traffic the birds and the birds were seized.

[4] Mr. Maynes applied to Provincial Court for the return of his confiscated birds under s. 97.6 of the *Act*. His application was refused by Gulbransen P.C.J. on September 22, 2008 (the "decision"). The trial judge held that Mr. Maynes did not have a permit, without which he was not "lawfully entitled to the wildlife" (at paras. 4 and 6). Mr. Maynes appeals from that decision in accordance with s. 97.6(5).

[5] Mr. Maynes accepts that he requires a permit for the eagle and one of the falcons: the peregrine falcon. He maintains that the remainder of the confiscated birds (three Harris hawks and a hybrid falcon) are non-indigenous, domestically bred birds that fall outside the jurisdiction of the *Act* and its requirement for compliance with the *Regulations*.

II. Issue

[6] Did the trial judge err in his conclusion that Mr. Maynes was required to have a permit for each of the Harris hawks and the hybrid falcon, in order that he be “legally entitled” to their return?

III. The Legislative Regime

[7] Section 1 contains the following definitions:

"controlled alien species" means

- (a) a species designated by regulation under section 6.4 as a controlled alien species, and
- (b) hybrid animals and fish that have an ancestor within 4 generations that is a species designated as a controlled alien species;

"native species" means a species that

- (a) is indigenous to British Columbia, or
- (b) has extended its range into British Columbia from another part of North America, unless
 - (i) the species was introduced to North America by human intervention or activities, or
 - (ii) any part of the extension of its range within North America was aided by human intervention or activities;

"raptor" means a bird of the order Falconiformes known as vultures, eagles, falcons and hawks or the order Strigiformes known as owls, and includes its eggs;

"wildlife"

- (a) means raptors, threatened species, endangered species, game and other species of vertebrates prescribed by regulation, and

...

but does not include controlled alien species;

[8] Section 2(1) of the *Act* provides that ownership in all wildlife in British Columbia is vested in the government. Subsection (2) provides:

A person does not acquire a right of property in any wildlife except in accordance with a permit or licence issued under this Act...

[9] Sections 6.4, and 6.5 of the *Act* provide:

Controlled alien species

6.4 If the minister considers that a non-native species described in paragraph (a) or (b) of the definition of "species" poses a risk to the health or safety of any person or poses a risk to property, wildlife or wildlife habitat, the minister may make regulations designating the species as a controlled alien species.

Regulation of controlled alien species

6.5(1) The minister may, by regulation, regulate, prohibit and impose requirements in relation to the following:

- (a) the possession of a species individual of a controlled alien species;
- (b) the breeding of controlled alien species;
- (c) the release of a species individual of a controlled alien species;
- (d) trafficking in species individuals of a controlled alien species;
- (e) the shipping or transporting in British Columbia of, or the engaging of another person to ship or transport in British Columbia, a species individual of a controlled alien species.

(2) In making regulations under subsection (1), the minister may do one or more of the following:

- (a) define classes of controlled alien species;
- (b) make different regulations for different controlled alien species or classes of controlled alien species;
- (c) delegate a matter to a person;
- (d) confer a discretion on a person.

[10] Section 97.6 provides:

Disposition of wildlife seized and detained as evidence

97.6 (1) This section applies in respect of wildlife detained under section 97.4 if a responsible official determines that the wildlife is not required for law enforcement purposes and gives notice of that determination to the person from whom the wildlife was seized.

(2) The person from whom the wildlife was seized may make an application to a justice on at least 3 days' notice to the minister.

(3) An application under subsection (2) must be made within 30 days from the date that the person receives notice referred to in subsection (1).

(4) On the hearing of an application under subsection (2), the justice must order that the wildlife be returned

- (a) to the person from whom it was seized, if satisfied that the person is lawfully entitled to the wildlife,
- (b) to another person, if

- (i) satisfied that the person from whom the wildlife was seized is not lawfully entitled to the wildlife but that the other person is, and
 - (ii) this other person is known, or
 - (c) if neither paragraph (a) nor (b) apply, to the government to be disposed of as the minister directs.
- (5) A person aggrieved by an order under this section may appeal the order to the Supreme Court and, for the purposes of the appeal, sections 103 to 114 of the *Offence Act* apply.

...

[11] Section 108(2)(c) provides for the enactment of regulations:

- (c) respecting applications for licences, permits ... specifying conditions of eligibility for them including proof of financial responsibility or insurance for third party liability and discriminating among classes of applicants for them whether or not the classes are specified in this Act;

[12] Section 6.4 was added as an amendment to the *Act* in 2008. The comments of the Minister of the Environment, the Honourable B. Penner, when Bill 29, *Environmental (Species and Public Protection) Statutes Amendment Act, 2008*, was discussed in the legislature upon first reading on April 16, 2008, were as follows:

I'll begin by noting a few of the amendments of the Wildlife Act. Amendments to that Act will provide the government for the very first time with new authority to regulate the possession of alien species such as large carnivores, venomous snakes, primates and other animals and fish that can harm British Columbians and our native wildlife and wildlife habitat...

[13] At second reading of the Bill on May 20, 2008, the Honourable B. Penner stated:

As with my remarks at first reading I would like to begin by speaking to the changes proposed for the Wildlife Act. One of the most significant changes being proposed for the Act is the introduction of new provisions to enable regulation of the ownership of potentially harmful "alien species" in British Columbia. These amendments build on my commitments and on those given by the Minister of Agriculture on Lands last year to regulate alien species that may be harmful to British Columbians and our native wildlife.

Traditionally, in Canada there have been very few legal tools that provincial governments have had to regulate the possession of alien species. The amendments in this bill will close this gap for British Columbia.

...

These changes to the Wildlife Act will allow the Government to regulate, prohibit and impose requirements on the possession, breeding, release, trafficking, shipping and transporting of controlled alien species in British Columbia.

It is also import to recognize that not all alien species are harmful. We are only concerned with controlling the possession of those species that pose a risk to the human health and safety, property, wildlife or wildlife habitat.

[14] The *Wildlife Act Permit Regulation*, B.C. Reg. 253/2000, provides for the issuance of licences and permits. The *Wildlife Act Controlled Alien Species Regulation*, B.C. Reg. 94/2009, designates “controlled alien species”.

IV. Appellant’s Position

[15] Mr. Maynes is seeking the return of the confiscated birds including three Harris hawks, domestically bred (two from Ontario and one from Omama, B.C.), and a hybrid bird of falcon descent, bred in Grayson, Saskatchewan. Mr. Maynes maintains that he does not require a permit issued under the *Act* in order to be legally entitled to return of the birds.

[16] Mr. Maynes argues that one objective of the *Act* is to regulate various indigenous species of vegetation and animals referred to as “native species” in the *Act*. He asserts that with the exception of the peregrine falcon and the eagle, the confiscated birds do not fall within the category of “native species”.

[17] Mr. Maynes says further that another objective of the *Act* is to regulate species brought into British Columbia from other areas, where those species pose a risk of harm. Those non-indigenous species that require regulating are described by the *Act* as “controlled alien species”. This category includes species that pose a danger to people, property, wildlife, or wildlife habitat.

[18] The definition of “wildlife” in the *Act* refers to “raptors, threatened species, endangered species ...” but does not include controlled alien species. Mr. Maynes argues that the legislature has defined the characteristics of the excluded class of species (controlled alien species) by setting out the circumstances and manner in

which these species will be regulated under the *Act*. Mr. Maynes asserts that the confiscated birds are not native and are not, by definition, controlled alien species. Therefore, he says, there must be a third category of wildlife in addition to native species and controlled alien species, which is: “other alien species that do not require regulating or controlling”. Mr. Maynes asserts this category includes an alien species that is not capable of creating harm. The *Act* only controls native species and controlled alien species, but not other alien species. Because the *Act* does not regulate other alien species, this indicates that the legislature intended that certain alien species be excluded from the requirement for a permit or licence.

[19] The appellant relies on Ruth Sullivan, *Sullivan and Dreidger on the Construction of Statutes*, 4th ed. (Markham: Butterworth, 2002) at 168, which discusses implied exclusions and explains that an intention to exclude may legitimately be implied where everything is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given the expectation of express mention, the silence of the legislature becomes meaningful.

[20] Mr. Maynes refers to analogous circumstances where alien species do not pose risks and are properly exempt from being regulated under the *Act*. He refers to tropical fish in a fish tank or other pets purchased in a pet store, which are not intended to be regulated under the *Act*.

[21] Mr. Maynes has provided two opinions from other falconers, each of whom evaluated the individual birds seized and determined whether each was of native or alien ancestry and whether each bird posed a risk to any person, property, wildlife, or wild habitat. These individuals confirm that none of the Harris hawks or hybrid falcon is native, nor do they pose a risk to the health or safety of any person or pose a risk to property, wildlife, or wild habitat.

[22] Mr. Maynes asserts that because the *Act* imposes penalties, or has the effect of taking away a vested right of property, it must be given a strict construction. It should not be interpreted as interfering with an individual's property rights to any

greater degree than is consistent with the fair interpretation of the words used.

Section 2 of the *Act* provides that all species designated as wildlife are deemed to be property of the Crown. The *Act* also removes various civil freedoms, such as the right to privacy and the right to be free from search and seizure without warrant. Mr. Maynes submits that as the *Act* interferes with basic fundamental rights, it should be narrowly interpreted.

[23] Mr. Maynes argues that when an individual lawfully acquires a live alien raptor in another jurisdiction and brings the bird to British Columbia, the bird does not fall under the *Wildlife Act* and is not the property of the Crown; he says it is the property of the individual. The appellant submits the declaration in s. 2 of the *Act*, that wildlife is the property of the Crown, does not automatically transfer ownership of wildlife brought into British Columbia from the individual to the state unless that animal poses a risk.

[24] Mr. Maynes asserts that with specific regard to importing and retaining non-resident wildlife, the *Wildlife Act* provides it is unlawful to import or possess wildlife taken in another jurisdiction into British Columbia unless the wildlife was acquired legally. Mr. Maynes argues that those sections of the *Act* are for the protection and management of native resources. Alien or non-native species are outside of the purpose of the *Act* except where there is a need to provide protection. Mr. Maynes suggests that although the Crown has ownership of wild members of the species of raptors, individual birds imported are subject to federal import regulations. They can be clearly identified as outside the larger category of wild birds. Abandoned imported birds should properly be held to be the private property of an individual owner and not the property of the Crown. As such they should not fall under the *Act*. *African Lion Safari & Game Farm Ltd. v. Kerrio* (1987), 37 D.L.R. (4th) 80 (Ont. C.A.).

[25] The *Act* was amended in 2009 to further define controlled alien species, by the addition of s. 6.4. Controlled alien species thus include non-native species that pose a risk to the health or safety of any person or pose a risk to property, wildlife, or wildlife habitat; and hybrid animals and fish that have an ancestor within four

generations that is a species designated as a controlled alien species. Mr. Maynes notes that B.C. Reg. 94/2009, does not designate any of the confiscated birds as controlled alien species. Mr. Maynes argues that the previous definition of wildlife did not cover alien species. The remarks of the Minister of the Environment demonstrate that the legislature intends to limit its jurisdiction to non-native species that are harmful to our native wildlife. Mr. Maynes asserts that the revisions to the *Act* clarify the *Act's* intention, which is to protect and preserve those species that make up the biodiversity of our province. The intent is not to manage or control those birds or animals from other jurisdictions, except when necessary to protect or preserve our natural species, the environment, our people, or property.

[26] Mr. Maynes submits that a careful analysis of the *Act* as a whole is required to determine the intent of the legislature. That interpretation is assisted by a review of the Hansard notes, which transcribe the legislative debate concerning amendments to the *Act* in 2008 and a history of the legislation: *R. v. Morgentaler*, [1993] 3 S.C.R. 463.

V. Respondent's Position

[27] The respondent submits that there is no ambiguity in the legislative language. Section 1 of the *Act* defines "wildlife" to include "raptors"; and defines "raptors" to include eagles, falcons, and hawks. There is no regulatory exemption for captive-bred raptors as there is in s. 17.02 of the *Wildlife Act General Regulation*, B.C. Reg. 340/82, for captive-bred quail, pheasant, partridge, wild turkey, or European rabbit. All raptors unambiguously fall within the definition of wildlife.

[28] The respondent submits that statutory interpretation is straightforward: the fundamental question is that of legislative intent. Where the meaning of the provision (when read in the context of legislation as a whole) is clear, it is to be given effect: *MacMillan Bloedel Ltd v. British Columbia (Ministry of Forests)*, 2000 BCCA 351, 76 B.C.L.R. (3d) 71 at paras. 50 - 51.

[29] The respondent asserts that Mr. Maynes is attempting to provide expert evidence about the interpretation of the purpose of legislation. The respondent refers to the two falconers who provided opinions that none of the confiscated birds is native, nor poses a risk to the health or safety of any person, or a risk to property, wildlife, or wild habitat: *R. v. S.(G.)* (1988), 67 O.R. (2d) 198 (Ont. C.A.) at para. 29.

[30] Because the *Act* provides that ownership of all wildlife is vested in the government, the respondent argues, property rights to wildlife can only be acquired through permits and licences. The *Act* provides for a comprehensive scheme of wildlife management in British Columbia, including the regulation of wildlife in captivity.

[31] The respondent urges that the trial judge correctly determined that Mr. Maynes was not entitled to return of the confiscated birds because he was “not lawfully entitled” to the wildlife in accordance with the test under s. 97.6(4). Further, the respondent says, it is illegal for a person to have wildlife in his or her possession in British Columbia other than “as authorized under a licence or permit or as provided by regulation”: s. 33(1). Dennis Maynes does not hold a licence or permit to possess the wildlife at issue and therefore, as Gulbransen P.C.J. determined, he is not “lawfully entitled” to return of the confiscated birds.

[32] The respondent asserts that while the definition of wildlife has been amended, the definition of “raptors” has not been amended- regardless of the inclusion of the clause “but does not include controlled alien species” under the definition of “wildlife.” The *Act* defines “controlled alien species” and none of the confiscated birds are listed in Schedule 1 of B.C. Reg. 94/2009, as being designated as controlled alien species.

VI. Decision

[33] I agree with the respondent’s position that the legislation is clear and it is to be given effect; thus, in the face of no ambiguity, the references of the appellant to the legislative debates are of no assistance to the Court.

[34] The definition of “raptors” in s. 1, which includes hawks and falcons, clearly applies to the confiscated birds of which Mr. Maynes seeks the return. As the definition of “wildlife” in s. 1 clearly includes raptors, it follows that hawks and falcons are wildlife, as that term is used under the *Act*. As per ss. 2(1) and (2), ownership in all wildlife in British Columbia is vested in the Crown and a person does not acquire a right of property in any wildlife except in accordance with a permit or licence issued under the *Act*. Thus, it is illegal for a person to have wildlife in his or her possession in B.C., other than as authorized under a licence or permit, or as provided by regulation. As Mr. Maynes does not hold a valid permit or licence, he has no legal entitlement to the confiscated birds.

[35] The argument of Mr. Maynes is creative but convoluted. While he suggests that the *Act* does not embrace alien species that do not require regulating or controlling (which are not capable of creating harm), such a construction is clearly contrary to the words of the statute and the definition of “raptors”.

[36] Further, as the respondent suggests, Mr. Maynes is attempting to rely on expert evidence to interpret the provisions of the *Act*. While the experts’ opinions support Mr. Maynes’ position that the confiscated birds are alien species that do not pose risks, he relies on those opinions to assert that they are properly exempt from being regulated under the *Act*. In essence, his reliance on the opinions of other falconers is an attempt to create an exception to the *Act* for his confiscated birds, when no such exception exists.

[37] The amendments made to the *Act* cannot support the interpretation that Mr. Maynes asserts. While “controlled alien species” are not included under “wildlife”, falcons and hawks are not included in the regulation that designates “controlled alien species.”

[38] Therefore, under s. 97.6(4) of the *Act*, Mr. Maynes is not lawfully entitled to the confiscated birds and the wildlife is ordered returned to the government to be disposed of as the Minister directs.

“Gropper J.”

THE SUPREME COURT
OF BRITISH COLUMBIA



THE LAW COURTS

MEMORANDUM

TO: The Parties and Legal Counsel

CC: All Legal Publishers

FROM: Superior Courts Judgment Office

DATE: August 6, 2009

RE: **Case Name: Maynes v. British Columbia (Environment)**
Neutral Citation: 2009 BCSC 1066
Docket: X072385

Please be advised that the attached Reasons for Judgment of Madam Justice Gropper dated August 5, 2009 have been edited.

- Date of Judgment on the front page has been amended to August 5, 2009

A copy of this memorandum and attached Reasons for Judgment will be placed in the court file. The original Reasons for Judgment which were previously distributed will be retained in the court file.

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