

BREAKING CASE LAW

R. v. Turnbull, 2015
NLPC 1712A00698



This Issue

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Bear – And Why
Should You Care?

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When is a Bear Not a Bear—And Why Should You Care?
Newfoundland Court Questions Provincial/Territorial Role in Regulating Polar Bears

An exceptional case out of the Provincial Court in Newfoundland has the interest of Provincial and Territorial wildlife departments, Federal Fisheries Officers and constitutional scholars, while leaving most other Canadians scratching their heads. Simply put, the outcome of the prosecution by Newfoundland's Fish and Wildlife Service of Darrel Turnbull for the March 2012 shooting of a polar bear that charged him and his family while he was visiting his cabin in Seal Cove, Labrador is that polar bears are now considered to be "fish" regulated under the Federal Fisheries Act. As a result, polar bears have been determined to be subject to the exclusive jurisdiction of the Federal Government under Canadian law.

Before one dismisses this case as a biological impossibility, it is important to remember that the definition of "fish" under the Federal Fisheries Act is a broad and encompassing term. Front and center in the Turnbull decision is the fact that the definition of "fish" under the Act includes "marine mammals" but does not specify whether such marine mammals include only those mammals who live exclusively in the marine environment such as whales, seals and walruses or whether the term can include mammals such as polar bears and otters that spend considerable time in the marine environment but also spend part of their lives on land.

Although this issue was not argued by the unrepresented Mr. Turnbull, in coming to the conclusion that polar bears are in fact marine mammals, the Honourable Justice Joy consulted diverse sources such as the genus name of polar bears, *Ursa maritimus* (which means maritime, marine or sea bear), Walker's Mammals of the World, the Museum of Natural History at the Smithsonian, and the Canadian Wildlife Federation's Hinterland Who's Who vignette series. Having determined that polar bears are indeed

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marine mammals included in the definition of “fish” under the Fisheries Act, the Court stated:

The Crown has not proven that the Queen in Right of the Province had subject matter or material jurisdiction over polar bears. I have found that, in pith and substance, polar bears are marine mammals, and as such fall under the exclusive jurisdiction of the federal government. (Page 2)

This is of course where the fascination with the biological anomaly of when you can say a bear is a fish, gives way to the significant constitutional question with important legal implications for Provincial and Territorial Governments with polar bears within their boundaries. Newfoundland’s Provincial Fish and Wildlife Department, similar to the Government of Nunavut’s Department of Environment, the Northwest Territories’ Department of Environment and Natural Resources, Manitoba Conservation and Water Stewardship, Wildlife Branch, Québec’s Ministry of Natural Resources and Yukon Environment have all regulated polar bears to some extent.

The actions of these regulatory authorities, whether restricting hunting, investigating and reporting defensive kills, listing polar bears as endangered, undertaking studies or participating in establishing polar bear quotas, were undoubtedly not premised on the assumption that polar bears fall under the exclusive jurisdiction of the Federal Government. If the case is not overturned in Newfoundland and the constitutional analysis is applied to other Canadian jurisdictions, it will signal a major change to the current regulatory approach to polar bears, where the Provincial and Territorial Governments generally occupy the primary regulatory role, with the Federal Government exercising only limited jurisdiction over the bears in the marine environment or when addressing issues relating to the maintenance of the bears’ marine habitat. It should also be noted that in the aftermath of significant cuts to the regional offices of Fisheries and Oceans Canada, the Federal Government has a diminished presence in the regions where polar bears are present that would not reflect this primary regulatory role.

It should be noted that the Government of Nunavut’s unique position in Canada’s constitutional framework (having been established under the Nunavut Land Claims Agreement and with express legislative jurisdiction over big game which includes “ursus” or all bears) and the recent devolution of Federal powers to the Government of the Northwest Territories may be distinguishing factors that limit the future application of this case in Nunavut and the Northwest Territories. However, the case may still be relevant in these territories, as a more robust federal presence may create overlap and require more concerted co-ordination efforts between the Territorial Governments’ regulation and management of polar bears and the Federal Department of Fisheries and Oceans’ exercise of their “exclusive jurisdiction”.

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