

ONTARIO COURT OF JUSTICE

HIS MAJESTY THE KING

v.

CONSOLIDATED HOMES

P R O C E E D I N G S A T C O U R T

BEFORE JUSTICE OF THE PEACE P. NICHOLS
on October 12, 2022, at North Bay, Ontario

APPEARANCES:

P. Gonsalves

Counsel for the Crown

B. Wilkie

Counsel for the Crown

G. Laplante

Counsel for Consolidated Homes

WEDNESDAY, OCTOBER 12, 2022

R E A S O N S F O R J U D G E M E N T

5 NICHOLS, J. (Orally):

On the 28th of March, 2022, the first day of the trial, I received a notice of Charter Application from the defence, section 7 of the Canadian Charter of Rights and Freedoms. I will rule on that Charter Application first.

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I have before me a six page document outlining the application of which two pages are the grounds for the application and the evidence to be relied upon for the application are 1, transcript evidence of R. v. Consolidated Homes, 2, oral submissions of counsel, 3, applicant's book of authorities and 4, such further and further and other sources as might be required and this Honourable Court shall permit. The order sought is exclusion of the conduct alleged and the evidence of the Crown witnesses and investigators. In the alternative a stay of all charges and third, any further order this Honourable Court deems just and appropriate. I received a response by the Crown and I have reviewed that document along with the Charter Application. The onus is on the defendant, the applicant, to provide evidence that a breach of section 7 of the Charter occurred. I heard no evidence from the defence during this trial with regards to this section 7 Charter breach. The defence counsel made a brief reference in his

5 submission regarding entrapment, but such
assertion and blanket statements are not evidence.
I have not heard any evidence from the Crown
witnesses relating to a section 7 Charter
violation. I have no evidence to weigh with
respect to this application. I find the defendant
has failed to prove any violation under section 7
of the Charter and I am dismissing the
application.

10 I will now render my decision.

15 Consolidated Homes, Ontario Corporation 879229,
was charged between the 1st of June and August 5th,
2018 at the vacant property blocks in the
geographic Township of Widdifield within the City
of North Bay in the northeast region, which are
numbered by property information numbers including
49142-0373, 49142-0374, 49142-0375 and 49142-0246,
20 did commit the offence of unlawfully damage or
destroy the habitat of a species that is listed on
the Species at Risk in Ontario list as a
threatened species, namely Blanding's Turtles,
contrary to the Endangered Species Act, 2007 SO
25 2007, Chapter 6, Section 10, (1)(a). This habitat
is protected under section 10(1)(a) of the Act
which provides no person shall damage or destroy
the habitat of 10(1)(a), a species that is listed
on the Species at Risk in Ontario list as a
30 threatened species. Blanding's turtles are listed
as threatened under the Endangered Species Act,
2007 Ontario Regulation 230-08, schedule three,

5 threatened species. In the Endangered Species Act
2007 it states that the purpose of this Act is 1,
to identify species at risk based on the best
available scientific information, including
information obtained from community knowledge and
aboriginal traditional knowledge, 2, to protect
species that are at risk and their habitat, to
promote the recovery of species that are at risk,
3, to promote stewardship, activities, to assist
10 in the protection and recovery of the species that
are at risk. The definition of habitat pursuant
to section 2(1) means A, with respect to a species
of animal, plant or other organism for which a
regulation made under clause 56(1)(a) is in force
15 the area prescribed by that regulation as the
habitat of the species or B, with respect to any
other species of animal, plant or other organism
and area on which the species depend, directly or
indirectly, to carry on its life processes,
20 including life processes such as reproduction,
rearing, hibernation, migration or feeding. And
it includes places in the area described in clause
A or B, whichever is applicable, that are used by
members of these species as dens, nests,
25 hibernacula or other residences.

30 I heard from five Crown witnesses, Officer Tim
Caddell, Officer Nathan Kirby, Bonnie Kennedy,
Maria Badilla, Valerie Murphy and Shamus Snell.
What is not in dispute is the date, time, location
of the alleged offence, the qualifications of the
expert witness, Shamus Snell and the owner of the

land in question, being Consolidated Homes Limited. The issue before the Court, did Consolidated Homes damage or destroy the habitat of a threatened species listed on a species at risk in Ontario, namely Blanding's turtles, by doing grubbing work in the area in question?

Background. On the 1st of June, 2018 through to August 5th, 2018 Consolidated Homes employees, using an excavator, cleared and dug an area that was located south of Circle Lake Road and east of the homes along Wallace Road and west of Circle Lake in the City of North Bay. I heard evidence Consolidated Homes Limited had been involved with residential homes building in North Bay for many years and they have been aware of the existence of Blanding's turtles and the importance of protecting their habitat. In reviewing the scope site environmental impact study that was prepared on their behalf in May of 2010 by Rob Blitz (ph) of Fry Ecological Services, an environmental specialist with Miller Surveying Limited. The report gives specific activities of work that can negatively impact on the wetland habitat therefore impacting species at risk, which includes Blanding's turtle. Those activities could include infilling of wetlands, change in water quality, vegetation removal, both aquatic and terrestrial, changes in natural water levels and changes in natural drainage patterns. The report included the potential impacts of work in riparian areas on

species at risk which identified Blanding's turtles to be likely present.

Evidence from the stop order that was issued on the 2nd of March, 2017 along with a covering letter from the Ministry of Natural Resources and Forestry confirms Consolidated Homes Limited were made aware of the presence of Blanding's turtles in the specified work area. It was stated in the letter that should further activities be proposed beyond the existing footprint existing altered area at the date of this letter, MNRF should be consulted to discuss potential avoidance measures or potential authorization to ensure compliance under the ESA and protection of the habitat. It is further stated in this letter "Blanding's turtles receive both species and habitat protection under the ESA. The ESA states that no person shall kill, harm or harass a species listed as threatened or endangered or damage or destroy the habitat of a species that is threatened or endangered that has habitat protection." In June and August of 2018 there is evidence that Consolidated Homes Limited used large equipment to grub or dig up the property south of Circle Lake Road, east of the homes along Wallace Road and West of Circle Lake. This caused a disturbance to the habitat as a result of the vegetation being removed down to the roots and the levelling of the land and mounding of soil. I heard evidence that according to the General Habitat Description, the technical document for Blanding's turtles, that

5 because the area was within 30 metres of the
Circle Lake wetland boundary it was category two
Blanding's turtle habitat. Officer Tim Caddell
and Nathan Kirby, both North Bay Conservation
officers, provided evidence, and I accept their
evidence, of attending at the location in question
and what they encountered when they arrived, just
to name a few examples. Boulders were freshly
moved, excavator present, vegetation cleared and
10 removed. Their evidence supported the evidence
that the area in question was a category two
Blanding's turtle habitat according to the general
habitat description based on the area being within
30 metres of the Circle Lake wetland boundary. I
15 heard evidence from Bonnie Kennedy, and I accept
her evidence, her evidence is she works with the
Geographic Information Systems and she provided
evidence of a drone having mapped the wetland
boundary and 30 metres beyond to depict the
20 category two habitat at the offence location.

25 Mr. Shamus Snell is a Management Biologist and was
qualified as a Blanding's turtle expert to give
opinion evidence regarding these turtles. His
work has been on Blanding's turtles as a species
at risk and how their habitat is impacted by
development in the North Bay district. Mr. Snell
is very informed of the life cycle of Blanding's
turtles in their habitat environments. His
30 evidence is that the area in question, that being
the area south of Circle Lake Road where the work
was being completed as an area of Blanding's

turtles habitat. His evidence is that the species would utilize the area for mating, basking, hiding, nesting, foraging, thermal regulation and as a travel corridor. Mr. Snell further provided evidence of damage to the property in question because of grubbing work in June of 2018 and how it damaged the habitat. One, removal of vegetation reduced the food supply for the very species that Blanding's turtles feed on, two, removal of the vegetation and therefore shaded areas effected the turtles thermal regulation opportunities, three, removal of vegetation resulted in exposed soils and therefore increased erosion and increased sedimentation in the adjacent water, four, vegetation in a riparian zone above a wetland helps filter and absorb the nutrients, for example from lawn fertilizer, that negatively affect wetland, the removal of vegetation here removed that buffering function in certain locations, five, removal of the vegetation made the site less valuable as a nesting habitat as both eggs and young turtles would be more susceptible to predators, six, the work was done during the active nesting season for turtles without exclusion fencing to prevent harm to turtles that may have been on the site when the work was done and seven, the earth and berm pushed up along the wetland edge, blocked water from flowing to the wetland, diminishing the supply of water to a critical area for the species. Mr. Snell is an expert in the field of Blanding's turtles and in the habitat. They need to survive.

5 He provided for the Court evidence that the habitat was damaged by the actions of the Consolidated Homes Limited in June of 2018. From his evidence we heard that the Blanding's turtles need protection therefore that protection must be in the areas or habitat that we know they rely on.

10 I heard evidence from Valeria Murphy, and I accept her evidence, she is a regulations officer with the North Bay Mattawa Conservation Authority responsible for the administration and enforcement of Ontario regulation 177-06, it's the development regulation. Prior to that position she was
15 employed with the MNR as a biologist from 2009 to 2017 and some of her work during that time related to the Endangered Species Act. Her evidence was if a person wants to site grade within 30 metres of a wetland boundary a section 28 or a DIA permit is required before activities can begin. Her
20 evidence is on the 6th of June, 2018 she received a request from Robert Susko of Consolidated Homes Limited for a DIA permit as the company had already started to level some of the piles of dirt at Circle Lake Road in North Bay. Specifically it was east of the homes along Wallace, south of Circle Lake Road and west of Circle Lake. Her
25 evidence is she attended at the site on the 12th of June, 2018 and was surprised by the amount of grading and levelling of the land that had taken place. While she was there she had a conversation with Mr. Susko about the possibility that it may
30 be a habitat for species at risk and that species

at risk may be in the area, in particular Blanding's turtles. His response was that he had spoken with Rick Miller, the owner of Miller and Urso surveying, who had stated the area is likely category two Blanding's turtles habitat. The DIA permit was signed on the 14th of June, 2018 therefore any work that had taken place before this date had not been approved or authorized by the North Bay Mattawa Conservation Authority. The purpose of me reviewing this evidence is that Consolidated Homes Limited were not charged under the Authority Act, however it provides evidence that employees of Consolidated Homes Limited were made aware on the 6th of June, 2018 that the area in question was a habitat for species at risk, namely Blanding's turtles.

I accept the evidence provided by the independent witness, Maria Badilla who lived at 1 Circle Lake Road in North Bay and who on the 11th of June, 2020 took a picture of a turtle with her iPhone. The picture is of a turtle at the end of the water considering that Blanding's turtles are using the wetlands in the Circle Lake area. Now, I do note that this photo was taken after the offence date.

Mr. Laplante, on behalf of Consolidated Homes Limited, did not call any evidence however in his submissions Mr. Laplante speaks to Mr. Snell's evidence and to sum up what Mr. Laplante's concern is is the fact that at the end of his cross-examination Mr. Snell agreed with him that the

5 area in question was land that had potential to be
habitat for Blanding's turtles. Mr. Laplante
stressed that this was only Mr. Snell's opinion
and he reminded the Court that Mr. Snell was an
employee of the Ministry therefore he must be seen
as unbiased and not providing the evidence to
support the Crown's case. Mr. Laplante's
submission is that the Crown did not prove that
10 there was Blanding's turtles habitat at the
location in question.

15 Case law states expert witnesses are often
retained by one party and paid to prepare a report
and testify for that party. That in itself is not
grounds to find an expert has crossed the line to
become an advocate for one side. There must be
more than that. The lack of independence must be
apparent from the expert's report and or
testimony. Departmental, Ministry or agency
20 employees often testify as experts and that is a
case R. v. Montgomery, 2014 ONSC 2775. I accept
the evidence of Mr. Shamus Snell who found the
grubbing work at the location in question in June
2018 damaged the habitat of an endangered species,
25 the Blanding's turtle. It is clear from his
evidence that the area in question is turtle
habitat, Blanding's turtle habitat.

30 I'm not left with reasonable doubt in Mr.
Laplante's cross-examination of Mr. Snell. Mr.
Laplante is relying on defence's of officially
induced error and due diligence. I have no

evidence called by the defence with respect to one, of officially induced error and two, due diligence. I only have evidence from the Crown. With regards to Officially Induced Error it's available where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. The onus is on the accused to prove that he relied on the erroneous advice and that his reliance was reasonable. Further, the case of *Levi City v. Tetreault* 2006 SCJ states the elements required to establish officially induced error they are one, an error of law or of mixed law and factors made, two, the defendant considered the legal consequences of his or her actions, three, the advice was obtained from an appropriate official, four, the advice was reasonable, five, the advice was wrong and six, the defendant relied on the advice in committing the act. Mr. Laplante is submitting that Consolidated Homes relied on the map in the stop order and that would constitute officially induced error. Attached to the stop order was a reminder to check further if going outside this area. I find the information in the order was not erroneous and the reliance on this information was not reasonable. If they would have relied on it they would have checked with the Ministry of Natural Resources and Forestry before doing this. I do not find the defence of officially induced error was proved on a balance of probabilities. With regards to due diligence,

Mr. Laplante refers to the case of R. v. Douglas. In reviewing this case and reviewing the evidence I do not find Consolidated Homes Limited demonstrated due diligence. Due diligence is steps a reasonable person would take to avoid the commission of the offence. I fail to find any due diligence in this matter. The company used an excavator to clear and dig when they had prior knowledge there was, in this area, turtles and possibility in other areas as per the stop order. As per the evidence Ms. Murphy was surprised by the amount of grading and levelling that had been done. The defendant took no steps to inquire, they simply relied on one portion of the previous stop order, the map depicting the area, the part that was helpful to them and disregarded the letter. Once the damage was done they called Conservation Authority and when Ms. Murphy visited the site they were further reminded of a turtle habitat. Again, I do not find due diligence was proved on a balance of probabilities. I refer to the case of South Bruce Peninsula where the Ontario Court of Appeal suggests the Act, the Endangered Species Act, be given a generous interpretation in light of its remedial nature and its objective of environmental protection. As noted in the Supreme Court of Castonguay Blasting Limited v. Ontario 2013 SCC 52 at paragraph nine, "Environmental protection is a complex subject matter. The environment itself and the wide range of activities which might harm it are not easily conducive to precise codification. As a result

environmental legislation embraces an expansive approach to ensure that it can adequately respond to a wide variety of environmentally harmful scenarios, including ones which might not have been foreseen by the drafters of the legislation. Because the legislature is pursuing the objective of environmental protection its intended reach is wide and deep." Consolidated Homes Limited had for at least 10 years been made aware of the existence of Blanding's turtles near Circle Lake in North Bay. There was the environmental report prepared for them, there was a stop order dated the 2nd of March, 2017, the work it was doing along Wallace Road in North Bay, which included a letter requesting that they consult the Ministry of Natural Resources and Forestry prior to doing any work in any new areas to ensure compliance under the Endangered Species Act and protection of the habitat.

There have been many discussions with the Ministry staff and Consolidated Homes on the 6th of June, 2018 applied for and obtained a permit to grade and clean the site from the North Bay Mattawa Conservation Authority after the president of Consolidated Homes Limited used a large excavator and cleared and dug in an area that was in an abutting wetlands in an area south of Circle Lake Road, east of homes along Wallace Road and west of Circle Lake. From the evidence presented to me during this trial, which includes evidence from the witnesses, the exhibits, case law and

5 submissions from Mr. Wilkie and Mr. Laplante I
find the elements of the offence have been met
beyond a reasonable doubt. The defence has not
proven on a balance of probabilities the defences
of officially induced error or due diligence. I
find Consolidated Homes did unlawfully damage the
habitat of a threatened species, namely Blanding's
turtles between the 1st of June and the 5th of
10 August, 2018. There will be a finding of guilt
and a conviction entered. And Madam Clerk, if you
could do that on my behalf, please.

COURTROOM CLERK: I can, Your Worship.

15 THE COURT: Thank you. All right. With regards
to penalty, Mr. Wilkie or Mr. Gonsalves, not sure
if you're prepared for that at this time.

MR. GONSALVES: Your Worship, firstly thank you
for the very detailed and considered reasons for
decision.

20 THE COURT: Thank you.

MR. GONSALVES: With respect to sentencing, it is
the prosecution's hope that we can complete it
today. The Crown has completed written
submissions that are ready to be sent to you and
also oral submissions to supplement those written
25 submissions. Before the written submissions are
sent though I'm wondering if we could have maybe a
10 minute recess for the Crown to reflect, Your
Worship's decision in the written submissions and
in particular the sentence recommendation that is
30 in the written submissions, Your Worship. So my
proposal in sum is that if we recess for 15 we
will send during that 15 our written submissions

for Your Worship to review, so perhaps maybe half an hour recess would be better.

THE COURT: Yeah.

MR. GONSALVES: And then when we return counsel could proceed with oral submissions, Your Worship. I haven't had a chance to speak to Mr. Laplante about process, but I'm hoping he's agreeable to something like that.

THE COURT: Go ahead, Mr. Laplante.

MR. LAPLANTE: I don't know what to say. I got Your Worship's message to be prepared for submissions if there is a finding of guilt and my friend has provided the materials to me in advance.

THE COURT: Okay.

MR. LAPLANTE: It seems reasonable, so.

THE COURT: Okay. So you're all right with this process if we go ahead and deal with this matter then today.

MR. LAPLANTE: Yeah.

THE COURT: I'm sure we'll all be happy to do it. Okay. Very well. So if Madam Clerk can send that off to me then and give me the opportunity to read them and review them and then we'll come back maybe - we'll go for 10:30. That works. If we need additional time we can certainly take that if that's required. Does that suit everybody?

MR. LAPLANTE: Yeah.

MR. GONSALVES: It does for the Crown, Your Worship. Thank you.

THE COURT: All right. Mr. Laplante.

MR. LAPLANTE: Sure.

THE COURT: Okay. Thank you. Thank you, Madam Clerk. I'll just wait for that.

R E C E S S

5 U P O N R E S U M I N G :

...EXCERPT BEGINS

10 R E A S O N S F O R S E N T E N C E

NICHOLS, J.P. (Orally):

15 The Crown is asking for a \$1 fine and an order to pay \$200,000 to Natura Conservancy Canada. I have heard that the money to Nature Conservancy Canada will preserve and aid in the recovery of the Blanding's turtles.

20 I have reviewed the written submissions from the Crown and oral submissions from Mr. Gonsalves and Mr. Laplante. I have reviewed the preamble again of the ESA and I certainly agree with the importance of protecting species that are at risk. They are vital for our future and our grandchildren's future.

25 The Crown is relying on sentencing factors provided in sentences, those being A, ecological damage caused by the offence, B, the size and what the defendant, C, the attitude of the defendant and D, other court sentencing decisions. I also reviewed the sentencing that was imposed in the R. v. [indiscernible] Rentals Inc. It is very

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5 similar to the matter that is before me today.
The defendant corporation was a land developer,
the defendant prior to doing the work was warned
about the possibility of Blanding's turtles
habitat on the property and the defendant
proceeded to damage the habitat by grubbing the
area, removing the natural vegetation.

10 Mr. Laplante's submissions included concerns about
the effects of covid on the company and how a
large fine would be a burden for the company and
that this is the first offence for Consolidated
Homes and Mr. Laplante's submissions also included
15 that there was no long term effect on this area by
what was done because a Blanding's turtle was seen
in the area in question in 2020. I've not heard
any financial evidence from the defence regarding
Consolidated Homes Limited's ability to pay or not
20 to pay a fine. Mr. Laplante also apologized on
behalf of the company and stated Consolidated
Homes Limited wanted to do better moving forward.

25 With regards to my decision on sentencing I have
considered the principles of sentencing, which
include the mitigating and aggravating factors and
submissions from both parties. I did not hear
information from the defence other the effects of
covid on the company, and again there is no
30 financial information provided to me today. I am
left with the case of R. v. [indiscernible]. This
case is very similar and is very recent, it is a
2021 decision. The difference being the damaged

5 area was at a larger scale, much larger scale than
the matter that is before me. With that case
being so similar I find the fine here should be
similar. I find that what the Crown is asking for
is reasonable in the circumstances and there will
be a fine of \$1 and an order to pay \$200,000 to
Nature Conservancy Canada. I don't know that I
have the order before me yet but my question would
be the amount of time required or requested, Mr.
10 Laplante.

MR. LAPLANTE: I'm going to ask for three years.

15 THE COURT: Okay. Well, I don't - I guess if
you're going to ask for three years if I could
just have an idea as to the reason for that
request. I mean, normally in these circumstances,
and I have to admit I've never had one that size,
we usually start with the 12 months, maybe Mr.
Wilkie can have some input here with regards to
that. Maybe 24 months when you're requesting
20 large amounts of this amount in fines like this.

MR. WILKIE: Your Worship, I wasn't sure you could
even give 24 months. I'm just sort of scanning
right now.

25 THE COURT: Now, this is a little bit of a
exception because this is an order, so I don't
have the order before me.

COURTROOM CLERK: I just sent it by email, Your
Worship. You should have it.

30 THE COURT: Okay. Okay. If you just give me one
moment I've got to just open it up. Mr. Wilkie,
sorry, I didn't have it beforehand, I'm just going

to try to look at it to see what it did state about the length of time.

MR. WILKIE: Yes, I was thinking 24 months to pay or three years to pay a fine is different than an order.

THE COURT: It's different. That's correct.

MR. WILKIE: Your Worship, I guess my feeling is that I don't know that we really heard why it takes three years to....

MR. LAPLANTE: Let's just go with what the Crown wants so we can finish this chapter of the sentencing. I'm asking for three years. That's my position.

THE COURT: Yes. And Mr. Laplante, I - I appreciate that. I can't - I apologize, I can't speak to that because this is an order. I don't have it before me. We can take a five minute break and I can look at it. I can't answer that because I don't have it before me. I haven't filled one out.

MR. LAPLANTE: I think on reflection, Your Worship, if the order is for a donation of 200,000.

THE COURT: Yes.

MR. LAPLANTE: It's taken from client payment.

THE COURT: Yes.

MR. LAPLANTE: So I would submit that we will do 12 months, it's fine and we can go from there.

THE COURT: All right. Mr. Wilkie.

MR. WILKIE: Yes. So I'm not sure that the order that I sent to Madam Clerk, it probably not the

right entry or type, it's a Word document so you can add, you know, by X date.

THE COURT: Madam Clerk, I just - it's just that I don't want to open it up, but can you just tell me on it does it have a to pay by or just a timeframe or it's just a statement saying an order that I've ordered this amount to be paid.

COURTROOM CLERK: The last paragraph has for it to be paid within blank amount of days and for the amount.

THE COURT: Okay. It does have that on it. Okay. So we can - we can certainly put the 12 months, Mr. Laplante, Mr. Wilkie, if that seems - it seems reasonable to me, but again it's just - I don't mind taking some time to look into it or we can go with that.

MR. WILKIE: I'm content with that.

THE COURT: Okay. Mr. Laplante.

MR. LAPLANTE: That's fine.

THE COURT: Is that all right. So the order will be, Madam Clerk it will be mailed to Mr. Laplante, is that how it goes?

COURTROOM CLERK: Yes. I'll send him a copy by email.

THE COURT: Okay. Very well. And Mr. Wilkie will get a copy also.

COURTROOM CLERK: Yes.

THE COURT: Okay. If you could stay on at the end and we'll talk about that more, okay.

MATTER CONCLUDED

Form 3

FORM 3

ELECTRONIC CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))

Evidence Act

I, K. Culin, C.C.R., certify that this document is a true and accurate transcript of the recording of R. v. Consolidated Homes in the Ontario Court of Justice, held at North Bay, Ontario, on October 12, 2022 taken from Recording No. poa2560_20221012 which has been certified in Form 1.

December 9, 2022

Kim Culin

K. Culin, C.C.R.

ACT ID 8262930876

Ontario, Canada

(Signature of authorized person)

*This certification does not apply to the Rulings/Reasons which was/were judicially edited.

A certificate in Form 3 is admissible in evidence and is proof, in the absence of evidence to the contrary, that the transcript is a transcript of the certified recording of evidence and proceedings in the proceeding that is identified in the certificate.