

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Yasmin Nakhuda, Plaintiff

and

Story Book Farm Primate Sanctuary and Sherry Delaney, Defendant

BEFORE: The Honourable Madam Justice M.E. Vallee

COUNSEL: Theodore Paul Charney, for the Plaintiff

Kevin Donald Toyne, for the Defendants

HEARD: May 30, 31, June 10 and 11, 2013

REASONS FOR JUDGMENT

Overview

[1] Yasmin Nakhuda had a pet monkey. On December 9, 2012, she went shopping and took the monkey along. She left him in a double locked crate inside her locked car. She did this because the store she was attending did not allow pets. While she was in the store, the monkey escaped from both the crate and the car and ran away. He entered the store and was picked up there by Toronto Animal Services. When Ms. Nakhuda arrived at the shelter to claim the monkey, TAS would not give him to her. Ms. Nakhuda signed a document which stated, “I surrender/sign over the animal...” TAS had the monkey tested to determine whether he was carrying any diseases and in particular, Hepatitis B, which is fatal to humans. He was clear. TAS took the monkey to Story Book Primate Sanctuary where the Sanctuary signed an adoption form. Ms. Nakhuda brings this action against the Sanctuary and its owner, Sherry Delaney, to recover the monkey.

Issues

[2] The parties agree that the central issue to be determined is who owns the monkey.

[3] In order to answer that question, several other issues need to be considered.

(a) Is the monkey *ferae naturae* (a wild animal)? If he is and if there an ownership interest in a wild animal only when it is in the owner’s possession, do exceptions (i) and (ii) apply? Do the principles in (iii) and (iv) apply?

(i) Does the doctrine of *animus revertendi* (whether the animal had a normal habit of returning home) apply?

- (ii) Does the doctrine of immediate pursuit (by the owner of the animal) apply?
- (iii) Does the animal have to regain its natural liberty before the owner loses ownership?
- (iv) Do the principles of common law apply in the face of a bylaw?
- (b) Was the monkey a gift?
- (c) If Ms. Nakhuda owned the monkey after he escaped, did she understand the TAS form that she signed transferred ownership of the monkey to the City of Toronto?
- (d) Was Ms. Nakhuda unduly influenced when she signed the form? Is it unenforceable?
- (e) If the TAS form is unenforceable, did TAS unlawfully detain the monkey?

[4] The parties agree that the court does not have jurisdiction to determine what is in the best interests of the monkey. For example, is it best for him to live with Ms. Nakhuda or in the Sanctuary? The monkey is not a child. Callous as it may seem, the monkey is a chattel, that is to say, a piece of property. The court may apply only property law principles when considering the issues in this case.

Background

[5] Ms. Nakhuda is a lawyer. She runs her own firm where she practises corporate/commercial law and carries out real estate transactions. Ms. Nakhuda is interested in exotic pets - she has several exotic birds. One of her clients told her about an exotic pet dealer who sold animals that were not available for sale on the Canadian market. She was very interested in meeting this man but he was the sort of person who “checked out” people before he dealt with them. Ms. Nakhuda’s client gave him her name and he contacted her a few weeks later. His name is Ayaz. His last name is a mystery.

[6] On November 28, 2012, a few weeks before the monkey escaped from her car, Ms. Nakhuda sent a five page email to a monkey trainer in the United States. She set out, very candidly, the circumstances in which she bought the monkey and the challenges that she was having with him. She asked for the trainer’s advice. I consider this email to be a reliable source for the facts in this matter. Ms. Nakhuda wrote it before the events occurred that led to this lawsuit. She was completely frank in the email as she wanted the trainer to understand the difficulties that she was having with the monkey so that she could obtain proper advice. The paragraphs below summarize some parts of the email.

[7] When Ms. Nakhuda heard about Ayaz, she understood that he sold white tigers, bald eagles, monkeys and kangaroos. She was interested in meeting a monkey as she had no experience with them. Ayaz came to Ms. Nakhuda’s house to see whether it would be suitable

for a monkey. After that, he invited her to come to his house and see the monkey that he had. Ms. Nakhuda and her husband went to Ayaz's house. Ayaz had a spider monkey. It was very small and fast and did not appeal to Ms. Nakhuda because she thought it would be difficult to control. She asked Ayaz if he could get a baby Japanese snow macaque. She had seen a video of one waiting on tables in a restaurant and thought it was interesting. To Ms. Nakhuda's surprise, Ayaz told her that he could get a Japanese snow macaque in a week.

[8] Ayaz called Ms. Nakhuda approximately seven days later and told her that he had two Japanese snow macaques – a very young male and a somewhat older female. Ms. Nakhuda went to visit them. She was surprised by the strength of the female and thought that she would have trouble controlling her. She was interested in the small male. At the end of the visit, she was not sure whether she could manage a monkey. Ayaz told her that she could take the male home with her on a trial basis and she could return him if she had difficulties. No payment was required. She agreed to do this and took him home.

[9] Right after Ms. Nakhuda brought the monkey home, she encountered problems. The monkey had to wear diapers to live in the house. He hated wearing them. He was hard to restrain during a diaper change and he would thrash around and bite Ms. Nakhuda during the process. At times, he would scream inconsolably. Ms. Nakhuda suspected that he missed his mother. He was so difficult to manage that Ms. Nakhuda asked Ayaz to come to her house to help her. He taught Ms. Nakhuda to have a very firm hand with the monkey. He grabbed the monkey hard by the throat and hit him in the side of the head. After this, the monkey complied with having his diaper changed. Ms. Nakhuda was not comfortable with using this amount of physical force on the monkey but realized that it was necessary to show him who was in charge.

[10] After a short time, Ms. Nakhuda concluded that she did not want to keep the monkey. She took him back to Ayaz to return him. When she tried to hand over the monkey, he ran back to her and clung to her. Ayaz told her that the monkey had bonded with her. She felt an obligation to keep him and care for him as she figured she had been the reason why he was separated from his mother at an age that was perhaps too young. Ayaz's initial price for the monkey was \$10,000. He told Ms. Nakhuda that she could have him for \$5,000, cash only. She made the payment. Ms. Nakhuda requested a receipt but Ayaz told her that he doesn't provide receipts or papers. Ms. Nakhuda understood that she had purchased an "illegal" animal.

[11] Ms. Nakhuda also knew that it was illegal to keep a monkey in the City of Toronto. She understood that there was a bylaw which listed prohibited animals and that monkeys were on the list. She thought the penalty would be a warning or fine. Ayaz told her that if the monkey ever escaped and was picked up by the authorities, she could call him and he would retrieve the monkey. He could do this because he had a licence for the monkey. She could then obtain the monkey from him.

[12] After Ms. Nakhuda discovered that the monkey had escaped from her car, she learned that he had been picked up by TAS. On her way to the shelter, she called Ayaz and asked him to help her retrieve the monkey. Ayaz said that the event was already being discussed on Twitter, even though it had just happened. He said that he could not get involved in the matter because

he did not want any media attention. A serious argument followed. Ayaz told Ms. Nakhuda that the best thing to do would be to forget about the monkey and walk away. He would refund the \$5,000.

[13] Ms. Nakhuda was extremely upset. She considered the monkey to be a member of her family. She could not walk away. She attended at the shelter and said she was there to pick him up. The officer at the shelter said that he could not release the monkey because Ms. Nakhuda did not have proof that he had been vaccinated. He explained that monkeys carry diseases and some of them are fatal to humans. The monkey required testing. If he tested positive, TAS would have the authority to euthanize him. The shelter did not have suitable facilities for a monkey. It was set up to deal only with cats and dogs. TAS needed to transfer him to a more appropriate facility.

[14] Ms. Nakhuda was asked to sign a form which stated, "I surrender/transfer over" the monkey to TAS. After having the form for approximately 10 - 20 minutes, making a phone call to a friend and discussing it with her husband who was there with her, she signed the form. Ms. Nakhuda's position is that she did not understand that she was signing over ownership of the monkey when she signed the form. The Sanctuary says that she must have known the meaning of the form, given her legal training. She had an opportunity to consider it and to consult with others before she signed it. The form uses common English language. The Sanctuary's position is that Ms. Nakhuda was not forced to sign the form. She could have walked away, obtained legal advice and taken appropriate steps.

[15] The following day, TAS transported the monkey to the Sanctuary. The owner of the Sanctuary, Ms. Delaney, signed an adoption form when he arrived. She described this form as a receipt. The monkey has remained at the Sanctuary. The Sanctuary refuses to give the monkey to Ms. Nakhuda.

(a) Is the monkey *ferae naturae* (a wild animal)?

[16] It is important first to determine whether the monkey is *ferae naturae* (a wild animal) or *mansuete naturae* (a domestic animal) because different property rights apply to those two categories of animals. The parties could find only one case that deals with the ownership of a wild animal that has escaped: *Campbell v. Hedley* (1917), 37 D.L.R. 289 (C.A.). The case was decided by the Ontario Court of Appeal 96 years ago. In this case, Campbell was a commercial fox breeder. One of his foxes escaped from its pen. This fox was one of a third generation of breeding stock. It ran away from Campbell's property and was shot by Campbell's neighbour, Hedley. Campbell was not immediately aware that it had run away. Campbell sued Hedley for the value of the pelt. In considering the matter, the court had to determine whether the fox was a wild or domestic animal. It considered the qualities of wild animals and stated that they are "wild by nature because of habit, mode of life or natural instinct, are incapable of being completely domesticated and require the exercise of art, force or skill to keep them in subjection." (*Campbell*, p.293) It concluded that wild animals are owned only while they are possessed. If they are no longer possessed by a person, that person no longer owns them.

[17] In quoting Lord Halsbury in his *Laws of England*, the court in *Campbell* stated that the common law classifies animals in two divisions, domestic/tame and wild. The wild class includes, "not only lions, tigers, eagles, and other animals of an undoubtedly savage nature but also deer, foxes, hares, rabbits, game of all kinds, rooks, pigeons, wild fowl and the like and all fishes, reptiles and insects." (*Campbell*, p. 291) Counsel for Ms. Nakhuda argued that some people keep rabbits, reptiles, fishes and insects as pets. They are not considered to be wild. The case does not reflect modern ways of thinking about animals and cannot be relied upon 96 years later. It is not current and its conclusions are too harsh to apply to Ms. Nakhuda's situation.

[18] When asked whether the monkey can be considered a domestic animal if it is not a wild animal, counsel for Ms. Nakhuda stated that he was uncertain. The court in *Campbell* notes that domestic animals have certain characteristics. Generally, they have been "domestic from time immemorial [and] have been accustomed to the association of man or by his industry have been subjected to his will and have no disposition to escape his dominion." (*Campbell*, p. 293) In exchange, they receive food and care. If they get out of their enclosures, they generally do not run away. If they do leave, they may return. Aside from circus performers, monkeys have been of service to humans by performing labour or as a livelihood though their breeding and sale for consumption. They are not farm animals such as horses, cows, pigs and sheep. They are not domesticated as pets similar to dogs and cats that live in their owners' homes. Only in rare circumstances do the efforts of a monkey provide a livelihood for its owner. I have no hesitation in finding that this monkey is not a domestic animal.

[19] *Campbell* states that the nature of an animal, rather than how it is treated, determines whether it is wild. The monkey lived in Ms. Nakhuda's house. He wore clothing. For a time, he slept in Ms. Nakhuda's bed. These attempts at domestication were imposed on him. He bit people - Ms. Nakhuda's husband received the worst of it. Ms. Nakhuda was concerned that as the monkey grew older and his adult canine teeth came in, the damage from his bites would become more serious. She thought about having some of his teeth removed to address this and to reduce the chance he would draw unwanted attention to himself. This is one of the issues that Ms. Nakhuda presented to the monkey trainer in her email. Monkeys cannot be house trained like other animals kept in homes as pets. They have to wear diapers. The monkey wore a harness most of the time so that he could not run away. Sometimes he did not wear a harness while he was in Ms. Nakhuda's back yard; however, he was closely watched.

[20] The Sanctuary presented two cases, *Connor v. The Princess Theatre* (1912), 10 D.L.R. 143 and *Maltais-Comeau v. Laliberte* (1986), 36 C.C.L.T. 26 (N.B.Q.B.). In these cases, a monkey and a baboon, respectively, bit people and caused injuries. The facts and legal issues are different from this matter. Nevertheless, in *Connor*, an Ontario decision and in *Maltais*, a New Brunswick decision, the courts applied the same rationale as in *Campbell* and found that the monkey and the baboon were wild animals.

[21] I find that the monkey is a wild animal by virtue of his behaviour and qualities. Although *Campbell* is an old case, its principles are still applicable now. Some people do keep exotic animals as pets. A high onus regarding provision of secure housing for wild animals is appropriate to place on their owners. Wild animals, particularly exotic ones, can be dangerous to

the public. If they are native to a warm country, they cannot survive in the Canadian climate. A witness from TAS explained that monkeys can carry diseases, some of which are fatal to humans. Owners of wild animals must take extraordinary measures to ensure that these animals are securely contained for the safety of the public and for the well-being of the animals. The City of Toronto determined that it did not want some types of wild animals to be kept within the City. It passed Bylaw 349 which prohibits keeping certain animals in the City, including monkeys.

(a)(i) Does the doctrine of animus revertendi (whether the animal had the usual habit of returning home) apply?

[22] The court in *Campbell* considered another issue, namely whether a wild animal had the usual habit of returning once it had escaped from human control. The court considered that if a wild animal had this habit, the owner from whom it had escaped could have a greater ownership interest in the animal once it had escaped. In these circumstances, the monkey could not have returned home once he escaped from Ms. Nakhuda's car. The parking lot where the car was located was some distance from her house. In Ms. Nakhuda's email to the monkey trainer, she states, "[he] must be kept on a leash at all times. The rare occasion when he is off leash and will not run away is when we are in the closed bathroom... I believe that... [he] knows that because the washroom is a small enclosed space and he has no chance of running wild even if he tries to, he does not try to run for most part of the time...he generally hates other monkeys. He will bite any stuffed monkey that you show him with rage. I cannot imagine him ever being without a leash." The evidence was that the monkey had not previously escaped. Accordingly, it is impossible to know whether it might have returned home. Accordingly, this issue cannot be determined.

(a)(ii) Does the doctrine of immediate pursuit (of the animal by the owner) apply?

[23] In *Campbell*, the court also considered the doctrine of immediate pursuit. This was found in section 345(3) of the English *Criminal Code* at that time which stated, "All other living creatures wild by nature shall, if kept in a state of confinement, be capable of being stolen so long as they remain in confinement or are being actually pursued after escaping therefrom but no longer." This indicates that an owner of a wild animal has a property interest in it so long as it is confined on the owner's property. The owner's rights in the wild animal are superior to the possessory rights of a thief who steals the animal if the owner immediately pursues the animal once it has been stolen. The court then went on to consider section 345(4) which stated, "A wild living creature shall be deemed to be in a state of confinement so long as it is in a den, cage or small inclosure [*sic*], style or tank, or is otherwise so situated that it cannot escape and that its owner can take possession of it at pleasure."

[24] The court found that although these provisions of the *Code* did not determine the civil ownership rights of Campbell and Hedley, they did provide guidance regarding the type of confinement or control that would give Campbell a qualified property interest in the fox, the limitations of those rights, how long they continued and how they were lost. The court paraphrased all of this by saying, "the fox was the plaintiff's [Campbell's] so long as it remained

in confinement or was being actually pursued after escaping therefrom, but no longer.” (*Campbell*, p. 298)

[25] Campbell’s fox was not stolen. He did not immediately pursue the fox as he was unaware that it had escaped. Accordingly, the court did not discuss what specifically was meant by “immediate pursuit” and did not apply it because it was irrelevant. Ms. Nakhuda stated that when she and her husband discovered that the monkey had escaped from the car, they searched the parking lot without success. Another shopper told them that she had seen the monkey running toward the store elevator area. Ms. Nakhuda and her husband returned to the store and learned that the monkey had entered the store. The staff had called TAS and an officer had come to pick up the monkey. Ms. Nakhuda immediately called the two TAS shelter locations that were closest to the store. She learned that the monkey had been taken to the shelter on Sheppard Avenue. She and her husband went to the shelter right away. Ms. Nakhuda argues that all of this shows that she had immediately pursued the monkey once she was aware that it had escaped. Because she had immediately pursued the monkey, she retained her ownership of it.

[26] In *Campbell*, the concept of immediate pursuit comes from section 345(3) of the English *Code* as it existed in 1917. In the current matter, TAS did not steal the monkey. It received a telephone call regarding a complaint that a monkey had entered a store where it was not welcome and it responded to a request that the monkey be taken away. As noted by the Court in *Campbell*, the provisions of the *Code* did not determine the civil ownership rights of Campbell and Hedley. I must determine the civil property rights of Ms. Nakhuda and the Sanctuary. Accordingly, I find that the criminal concept of immediate pursuit is not applicable in the circumstances.

(a)(iii) Does an animal have to regain its natural liberty before it is considered a wild animal with the consequence that its owner loses possession?

[27] Counsel for Ms. Nakhuda argued that a wild animal has to regain its natural liberty before the owner’s property rights are lost. He referred the court to an American case, *Wiley v. Baker*, 597 S.W. (2d) 3 (1980). This case concerned an elk that was shot and killed a month after it had escaped from a game farm. The court found that the elk had regained its natural liberty and therefore its status as a wild animal. Accordingly, it was no longer the property of the owner. In *Mullet v. Bradley*, 53 N.Y.S. 781 (1898), another American case, a sea lion was captured by a person who then claimed to own it. The owner left it on an island and it escaped. At some time considerably later, the defendant in the matter bought the sea lion from a fisherman who had captured it. The court held that the sea lion was a wild animal. The owner had lost his qualified property right in the sea lion once it had regained its natural liberty.

[28] Both *Wiley* and *Mullet* are distinguishable from this case because those animals were more or less in their natural habitat after they escaped. The court was able to conclude that they had regained their natural liberty. Furthermore, they are American cases which are not binding on Canadian courts. Monkeys are not native to Canada. In this case, the monkey could not regain his natural liberty unless it was taken back to the country where its species exists in the

wild. Accordingly, a requirement for a wild animal to regain its natural liberty before ownership is lost is not applicable to the facts of this matter.

(a)(iv) Do the principles of common law apply in the face of a bylaw?

[29] Counsel for Ms. Nakhuda argued that the common law principles in *Campbell* do not apply because the monkey was seized under the provisions of a bylaw. When a statute applies, it ousts the common law. Counsel cited *Gendron v. Supply and Services Union*, [1990] 1 S.C.R. 1298, a decision of the Supreme Court of Canada, to support this proposition. *Gendron* concerns a dispute among union members regarding whether the union had fairly represented them. Simply stated, the issue was whether the court had jurisdiction under the *Canada Labour Code* to consider a claim based on common law principles relating to a union's duty of fair representation or whether the matter should be decided by the Canada Labour Relations Board according to the provisions of the *CLC*.

[30] The legislation governing the Board contained a privative clause which stated that only the Board had jurisdiction to decide such a claim. The court had jurisdiction only to review the Board's decision, not to decide the matter on its merits. In reaching its conclusion, the court determined that Parliament meant to incorporate the common law duty of fair representation when it enacted the *CLC*. It stated that the relevant provisions of the *CLC* were identical to the common law duty. Parliament had enacted a comprehensive, exclusive code which covered the duty of fair representation so there was no need to also consider the common law duty as it would be a duplication. The terms of the *CLC* were wider than the common law and included a range of remedies that were not available under common law.

[31] *Gendron* deals with the application of common law principles in contrast to the application of a complete code enacted to cover labour relations issues. Both the common law and the *Code* dealt with the same issue, the duty of fair representation. In this matter, the bylaw sets out the circumstances under which dogs and cats may be apprehended and detained. It also provides that animals may be taken into protective custody. The common law principles set out in *Campbell* relate to ownership of wild animals that escape.

[32] While there may be some overlap on the ownership issue because the bylaw states that detained animals are forfeited to the City of Toronto if they are not claimed within a certain time limit, the focus of the bylaw is animal control with change in ownership as a necessary consequence for failure to claim an animal. The bylaw is not a codification of principles to be applied to wild animals that have escaped. I find that the principles set out in *Campbell* and the terms of the bylaw are sufficiently different from each other such that it is not necessary to determine which one applies to the exclusion of the other. It is worth noting that the court in *Gendron* stated, at p. 1318, that, "A different conclusion may also be warranted where it is not clear that the statute exclusively covers the breach." Accordingly, I find that the provisions of the bylaw do not oust the common law qualified property rights in wild animals.

[33] For the above reasons, I conclude that when the monkey ran away and Ms. Nakhuda lost possession of him, she lost ownership of him. Accordingly, she has no right to have him

returned to her. The Sanctuary is the owner of the monkey. Although this finding disposes of the matter, I will go on and deal with the balance of the issues.

(b) Was the monkey a gift?

[34] Before Ms. Nakhuda's evidence regarding the signing of the form is considered, it is important to understand her evidence regarding how she came to own the monkey. As described above, according to Ms. Nakhuda's email, Ayaz was selling exotic animals that were, "not for sale on Canadian markets." Ms. Nakhuda understood that the monkey was illegal. In her email, she states, "I don't know his exact date of birth as given he was illegal. I was provided with no paperwork for him...my biggest concern right now is his vet care. No vet is ready to take care of him as he is illegal." There is no doubt that Ms. Nakhuda thought she had bought an illegal monkey. When Ms. Nakhuda called Ayaz on her way to TAS, he advised her to walk away from the situation and said he would refund her \$5,000.00 purchase price. He wanted her to go away quietly so that there would be no further media attention. She did not do this. Instead, she courted the media and gave interviews. Her evidence was that she needed the media to help her case.

[35] After the monkey escaped, Ms. Nakhuda participated in a live, online chat with the Sun newspaper. There were many questions about how she obtained the monkey. She stated numerous times that she did not purchase the monkey. He was a gift. She also stated that she did not want to participate in the purchase of a monkey. This characterization evoked a sympathetic response to her situation. The fact that she had bought the monkey from a shady exotic animal dealer for \$5,000 changes the complexion of the matter.

[36] Although Ms. Nakhuda was vigorously cross-examined on this point, she refused to admit that the monkey was not a gift. In an affidavit sworn December 13, 2012, Ms. Nakhuda did not mention that she paid for the monkey. When it was suggested to her that she did not want people to know that she paid for the monkey, she answered, "it depends on the context. I wasn't out looking for a monkey. I'm not the type of person to buy a monkey. The breeder sold birds as far as I knew. He told me he had contacts. He didn't seem to be selling monkeys. It happened by coincidence. I didn't see him as a black market seller. It was innocent, not a purely commercial transaction." This statement is contradicted by Ms. Nakhuda's email to the monkey trainer. The purpose of her first visit to Ayaz was specifically to see a monkey. She did not like the spider monkey and requested a Japanese snow macaque. Even though she no longer had the monkey when the refund was offered, she rationalized that because a refund was offered, a "retroactive" gift had been made. At the time of trial, Ms. Nakhuda had not received the refund.

[37] Ms. Nakhuda swore a further affidavit, dated January 27, 2013. In this affidavit, she admitted that she had purchased the monkey. In her evidence at trial, she admitted that her email to the monkey trainer had been disclosed so she had to say in the affidavit that she purchased the monkey. She described her earlier statement as an error made in a rush to have documents prepared. She hoped that the email would not become public because there were personal issues. One of them was how she obtained the monkey. The first paragraph of the email states, "It is to be noted that this email is to remain strictly confidential and cannot be shared with a third party

without my written authorization.” The evidence of the purchase would not have been available but for the disclosure of the email.

[38] A gift is made when a person gives something to another with no expectation of payment. This monkey was not a gift. There is no doubt that Ms. Nakhuda paid \$5,000 for him. She admitted this. Ayaz’s offer to give the money back after the monkey was apprehended is properly described as a refund. Ms. Nakhuda’s maintaining that the monkey was a gift shows that she was prepared to embellish the facts to improve her legal position. This undermines her credibility.

(c) If Ms. Nakhuda owned the monkey after it escaped, did she understand that the TAS form that she signed transferred ownership of the monkey to the City of Toronto?

[39] When Ms. Nakhuda and her husband arrived at TAS, she spoke to Officer Behan. He would not release the monkey to her. She had no papers to prove that the monkey had been vaccinated. Mr. Carl Bandow, supervisor for South District Animal Services of the TAS, explained to the court that the governing authority for TAS is the Toronto Municipal Code, chapter 349 which is the main animal control bylaw in Toronto. The bylaw contains sections that deal with dogs and cats running at large and gives TAS the authority to seize and impound them. It sets out a redemption process by which owners can claim their animals.

[40] The bylaw also permits TAS to take an animal into protective care. This is defined as, “the temporary keeping of an animal to a maximum of five days, as a result of an eviction, incarceration, medical or fire emergency or any other situation that the Executive Director deems appropriate.” The bylaw does not say anything about seizing and impounding monkeys. It does not deal with monkeys at all except to say that keeping them is prohibited within the City. The bylaw states in section 349-2 that, “No person shall keep...any prohibited animal in the City...Prohibited animals are those classes of animals listed in Schedule A at the end of this chapter.” Schedule A lists monkeys as prohibited animals.

[41] TAS stated in earlier correspondence that it had taken possession of the monkey under the protective care provision of the bylaw. This action was deemed appropriate as Ms. Nakhuda had no proof that the monkey had been vaccinated. Mr. Bandow explained that he was very concerned about whether the monkey had been illegally imported. He was also concerned about serious health issues. Monkeys can carry infectious diseases, some of which are fatal to humans. An example of this is Hepatitis B. The monkey had to be tested because if the monkey was carrying a disease, he would have to be put down. For this reason, Mr. Bandow directed Officer Behan to see whether Ms. Nakhuda would voluntarily surrender the monkey. If she would, TAS would obtain ownership of the monkey and the bylaw provisions regarding authority to detain the monkey would not apply.

[42] Officer Behan gave the surrender form to Ms. Nakhuda and asked her to sign it. Ms. Nakhuda’s evidence was that Officer Behan threatened her or at least suggested some serious consequences that could result from her keeping a prohibited animal in the City. Criminal charges might be laid. According to her husband, Ms. Nakhuda had the form for approximately

10 - 20 minutes before she signed it. She made a phone call to a friend to let him know what was happening to the monkey. She discussed the form with her husband.

[43] All of the witnesses agreed that Ms. Nakhuda was extremely upset. Some of them described her as hysterical. She said that she had to sign the form because if she did not, TAS was not going to allow her to see the monkey. She said that she was under duress when she signed the form because she was afraid of the consequences that might result if she did not sign the form. Her husband said that they were told no criminal charges would be laid. Ms. Nakhuda felt that she had to see the monkey and she would not be permitted to do so unless she signed the form. She stated that she did not understand the form when she signed it. She thought that she was signing it just so the monkey could be tested. She did not understand that she was giving up her ownership rights to the monkey.

[44] Officer Behan had a different recollection of the events. He had a discussion with Ms. Nakhuda when she arrived at TAS and told her that the monkey was a prohibited species. He advised her that he would have to speak to his supervisor to get direction. He wanted to speak to Mr. Bandow regarding holding the monkey in protective custody. Mr. Bandow asked him to see if Ms. Nakhuda would sign over the monkey because it was prohibited. Officer Behan said he spoke to Ms. Nakhuda about the seriousness of the situation and the possibility that the offence could extend "beyond the municipal situation." A monkey had been brought into the country and there was no proof that it had been vaccinated. He told her that importing monkeys was illegal unless they were to be used for educational purposes. Ms. Nakhuda was not the importer; however, she already knew this because in her email to the monkey trainer, she said several times that he was "illegal."

[45] Officer Behan said that he explained to Ms. Nakhuda that if she signed the form, she would be signing over the monkey to the City of Toronto. She did not ask him any questions about it nor did she seem confused by it. He explained to her that the monkey would be taken somewhere more suitable and comfortable. He told Ms. Nakhuda that TAS would tell her where the monkey was and that she could most likely visit. Officer Behan denied saying that criminal charges would be dropped if she signed the form. Criminal charges were not within his jurisdiction. He denied saying that Ms. Nakhuda would not be able to see the monkey unless she signed the form. In fact, the staff at TAS needed her help to remove the monkey's diaper. They were instructed to wear hazardous materials suits while handling the monkey because of disease concerns. Officer Behan said that he would have asked Ms. Nakhuda to assist with the diaper removal, even if she had not signed the form.

[46] Officer Behan saw Ms. Nakhuda sign the form. It contains a list of boxes with a description beside each one. The form can address a variety of situations. There is an X in the box next to the description "Own Surrender" and a zero dollar value is noted. There is a check mark in another box at the bottom of the form. Beside that box, the form reads, "for owned animal(s) surrendered/signed over - I agree that by signing this document that, to the best of my knowledge, the animal(s) specified above has (have) NOT bitten anyone within the last ten (10) days. I also agree that the final disposition of the animal(s) specified above shall be at the

discretion of Toronto Animal Services.” (emphasis added). Ms. Nakhuda’s signature is at the bottom of the form.

[47] In my view, Ms. Nakhuda understood that by signing the TAS form she transferred ownership of the monkey to the City of Toronto.

(d) Was Ms. Nakhuda unduly influenced when she signed the form?

[48] Ms. Nakhuda said that she had no choice. She had to sign the form. She did not understand what it meant. I find her evidence to be unreliable on these points. She did have a choice. She could have walked away and consulted legal counsel the next day regarding her rights and the appropriate steps to take. The language of the form is in plain English. The words “surrendered/signed over” are not terms of art specific to TAS, as suggested by Ms. Nakhuda. They are common words and are well understood by lay people with no legal training. They are clear. They mean “give up/transfer to.” Ms. Nakhuda is not a lay person. She is a lawyer with 20 years of experience. In response to a suggestion that she could have called a lawyer, she stated, “I read the form. I understood the form. I’m a lawyer. I didn’t need legal advice.” She deals with legal forms daily in her commercial and real estate practice. It is much more likely that she signed the form because she knew that she had an “illegal” animal and was worried about the consequences. A reasonable person in her position likely would have done the same thing. Any illegal activities might impact on her licence to practice law. She had bought the monkey from someone who, in her own words, sold animals that “were not animals that one can sell on the Canadian market.”

[49] I find that Ms. Nakhuda was not unduly influenced when she signed the form. Officer Behan may have tried to persuade her to sign the form; however, she did understand the form that she was signing. She was not threatened. She could have walked away. She is not a timid person. She said that the form did not say “transfer ownership” and did not require “consideration” (money) so the form could not be valid transfer. The fact that Ms. Nakhuda can offer a legal analysis of the form and whether it amounts to a proper transfer document is inconsistent with her statement that she did not understand what the form meant. The fact that she claims not to have understood the form is similar to the fact that she claims that the monkey was a gift. Both are embellishments to improve her legal position.

[50] Even though Ms. Nakhuda was very upset when she signed the form, she did understand what it meant. She signed the form more likely because she knew that she had been caught with an illegal animal rather than as a result of experiencing any duress. She was worried about the consequences of her decisions. If Ms. Nakhuda did own the monkey when she signed the form, a valid transfer of ownership was made.

(e) If the TAS form was ineffective, did TAS unlawfully detain the monkey?

[51] Mr. Bandow said that the Executive Director delegates certain decisions to him. The Executive Director was informed of the situation when it occurred. Mr. Bandow said he would have detained the monkey regardless of whether Ms. Nakhuda signed the form. He would have

detained it under the bylaw's protective custody provisions, as he was very concerned about a possible health risk. The bylaw is clear that TAS can detain an animal in protective custody at the discretion of the Executive Director. The fact that there was no evidence that the monkey had been immunized would have given the Director or her designate sufficient concern to require that the monkey be held. If Ms. Nakhuda had not signed the form, TAS would have been acting within its authority to detain the monkey in protective custody.

[52] In my view, TAS did not unlawfully detain the monkey. It was entitled to do so in its discretion pursuant to the protective custody provisions of the bylaw. Concerns about an illegally imported monkey potentially having a communicable disease were good reasons to detain the monkey.

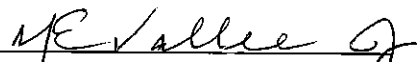
Conclusion

[53] Based on the evidence before me and the applicable law as I have determined it to be, I am satisfied on a balance of probabilities of the following:

- (a) The monkey is a wild animal. The concepts of a habit of returning home and immediate pursuit do not apply. Ms. Nakhuda lost ownership of the monkey when she lost possession.
- (b) Ms. Nakhuda understood that by signing the TAS form, she transferred ownership of the monkey to the City of Toronto. She was upset but was not unduly influenced when she signed the form. There were other options available to her. She was not required to sign the form.
- (c) TAS did not unlawfully detain the monkey. It was entitled to do so in its discretion pursuant to the protective custody provisions of the bylaw. Concerns about an illegally imported monkey disease were good reasons to detain the monkey.

[54] Accordingly, the action is dismissed.

[55] As to the question of costs, if the parties are unable to agree upon the costs of this action, written submissions limited to three pages in length shall be submitted to this court within thirty days of the release date of this judgment, via email through my assistant at jennifer.beattie@ontario.ca. If no submissions are received by that date, an assumption will be made that the parties have agreed on costs and that this court's involvement is no longer required on that issue.


Justice M.E. Vallee