

CANADA
PROVINCE OF NOVA SCOTIA

Case Numbers 1545674 &
1545679

IN THE PROVINCIAL COURT OF NOVA SCOTIA

HER MAJESTY THE QUEEN

- v -

MARILYN and WILLARD CAMERON

HEARD BEFORE: The Honourable Judge Robert A. Stroud

PLACE HEARD: Guysborough, Nova Scotia

DATE HEARD: November 22 & 23, 2006

DATE OF DECISION: December 11, 2006

COUNSEL: M. Louise Campbell, for the Crown
David S. Green, for the Defence

The Defendants have been charged with owning or harbouring a dog which is fierce or dangerous contrary to Section 13(d) of the Dog By-Law of the municipality of the District of Guysborough (hereinafter referred to as the "Municipality"). "Fierce or dangerous" is defined in s.

1(d)(3) of the by-law to mean:

"A Pit Bull Terrier, American Pit Bull Terrier, Pit Bull, Staffordshire Bull Terrier, American Staffordshire Terrier, Rottweiler or any dog of mixed breeding which includes any of the aforementioned breeds."

It is alleged by the Municipality that a dog owned by the Defendants known as "Zeus" falls within that definition and is seeking a monetary sanction under s. 25 and an order that he be destroyed or otherwise dealt with under s. 26.

Zeus came to the attention of the Municipal Dog Control Officer as a result of a complaint made about a neighbour's dog running loose. Mr. Mark Gosby, who described himself as the Superintendent of Public Works & By-Law Enforcement Officer for the Municipality, attended the Cameron residence on May 1, 2005. He stated that both defendants identified the larger dog (Zeus) as a Pit Bull or part Pit Bull and that the dog's general appearance was that of a Pit Bull. He visited the residence on Nov. 15, 2006 to serve a warrant to have the Defendant's two dogs picked up and taken to Guysborough for examination by an expert hired by the Municipality (Dr. Robb). At that time the Defendants agreed to take the dogs to town themselves. (Which, in my view, eliminates any argument concerning the validity of the search warrant.)

Mr. Gosby indicated that he has dealt with Pit Bulls, or part Pit Bulls, about a dozen times during the course of his employment and that he identifies dogs by their characteristics. He also stated that he was not aware of any situation where Zeus was aggressive toward any person or another animal. On cross examination, he stated he was never given any guidelines to assist him in identifying the dogs defined as fierce and dangerous in the by-law and, when shown a picture of the Defendants' two dogs, stated that the larger dog (Zeus) could be a Pit Bull.

John Hart, a Special Constable for the Municipality, also testified. He stated that he has been so employed for approximately five years and his duties include by-law enforcement. He accompanied Mark Gosby to the Defendant's residence on Nov. 15, 2006, that he had no training with respect to identifying Pit Bulls and that he generally identified them by their "big heads".

The main witness for the prosecution was Dr. Bruce Robb, who has been a practicing veterinarian for more than thirty years. He stated that he examined Zeus on Nov. 15, 2006 and, using a Pit Bull Identification Checklist developed by the City of San Francisco, determined that he has the physical conformation of the "Pit Bull type" to fit within the "Pit Bull Terrier" description in the by-law.

He, however, acknowledged that the Pit Bull is not a specific breed but rather a generic term used to describe a number of breeds and cross breeds with certain characteristics. He also acknowledged that a blood test is not available to genetically distinguish those breeds.

The defence called a total of four witnesses, all of whom have had considerable education, training and experience in the areas of dog breeding, handling, training and judging. While I was not asked to specifically qualify them as experts in their fields, I have no difficulty accepting their evidence based upon those qualifications. All of them expressed their aversion to what has come to be described as "Breed Specific Legislation" or BSL.

Dan Ross, a certified dog trainer, gave evidence primarily of the temperament of Zeus, which is not of any particular assistance in dealing with this by-law. (Other than to support an argument that it is far-reaching.)

Lee Stevens, a member of the Board of Directors of the Canadian Kennel Club, Chair of a Breed Specific Legislation Committee, and a member of a task force on breed specific legislation testified that she spends an average of six hours a day in dog related activities. She confirmed the testimony of Dr. Robb that Pit Bulls and Pit Bull Terriers are not recognized breeds and stated that Zeus is a mixed breed that cannot be typed because of the lack of a pedigree, but that he resembles several of the large Molossian breeds including the Mastiff.

Dr. Julia West has been a veterinarian doctor and dog trainer for twenty-six years. She testified that Zeus does not have the characteristics of any of the specific breeds or types of dogs identified in s. 1(d)(3) of the municipal by-law.

The final defence witness was Cathy Prothro. She has owned American Staffordshire Terriers for twenty-nine years and currently has twelve at home which she breeds and shows throughout Canada & the U. S. She has also acted as a judge for dog shows throughout Europe, Russia and the U. S. She

referred to Exhibit 18, the Canadian Kennel Club's Standards for American Staffordshire Terriers and Exhibit 19, the American Dog Breeders Association's Standards for American Pit Bull Terriers and stated that both breeds are much smaller than Zeus. She also testified that he would not fit within any of the other categories in s. 1(d)(3) of the by-law.

The solicitor for the Municipality has urged this Court to take a somewhat simplistic approach to this decision. As the argument goes:

1. the Municipal Government Act grants the power to the Municipality to enact dog by-laws, including the right to define fierce or dangerous dogs by breed, cross breed, partial breed or type;
2. the Defendants are the owners of Zeus and have admitted that is a Pit Bull or part Pit Bull;
3. Dr. Robb has identified Zeus as having the characteristics of a "Pit Bull type" to fit within the Pit Bull Terrier description and definition of "fierce or dangerous" under the by-law;
4. The witnesses who testified on behalf of the Defendants were biased in their assessment of the characteristics of Zeus; and
5. therefore, all the elements of the offence haven been proven beyond a reasonable doubt and the Defendants should be subject to one or more of the sanctions in the by-law.

The solicitor for the Defendants, on the other hand, has raised a plethora of issues. Those that are relevant for purposes of this decision are:

1. proof beyond a reasonable doubt that Zeus is a Pit Bull as defined in the by-law;
2. the by-law is vague and overreaching and is based upon fiction as opposed to objective or scientific standard; and
3. the fact that ownership preceded the by-law coming into force should permit the Defendants to continued control or ownership under the presumption of statutory interpretation known as non-interference.

At the conclusion of the trial I expressed some concern about the possible failure of the prosecution to provide dock identification of the Defendants. While I am satisfied that such was the

case, on further deliberation, I have concluded that the nature of this CASE does not require that form of identification. In R. v. Ross, [1989] 1 S.C.R. 3, the Supreme Court of Canada stated at p. 16:

“... the identity of the accused is not evidence emanating from the accused nor is it evidence that cannot be obtained but for the participation of the accused. A Person's identity is pre-existing real evidence inasmuch as a person's physical characteristics exist irrespective of any Charter violation or of any steps taken by the police.”

In my view, the only evidence required to meet the prosecution's obligation is that the Defendants are the owners of Zeus. Since there is no doubt in my mind that Mr. & Mrs. Cameron were in the courtroom during the trial and there can only be one Willard and Marilyn Cameron in Guysborough who own a dog named Zeus. Dock identification is not an essential element of this offence when identification has been clearly established by other means.

I also had an opportunity to reconsider my comment that there was no evidence to establish that the Defendants owned Zeus when the by-law was first enacted. I now agree with the Defendants solicitor that the evidence supports an argument that Zeus resided with the Defendants in Guysborough before 1995.

Proof Beyond a Reasonable Doubt

It is clear from the prosecution's expert witness, Dr. Robb, and the witnesses called by the defence that there is no such breed as a Pit Bull Terrier or an American Pit Bull Terrier and there is no blood test that can be performed to make such a determination. How, then, is it possible to prove beyond a reasonable doubt that any particular dog meets that description for purposes of a quasi-criminal prosecution?


In this case, the determination was made initially by the subjective examination of Zeus by the Municipal By-Law Enforcement Officer, combined with what the Defendants told him.. Dr. Robb subsequently used a checklist developed by the City of San Francisco for some purpose that is not clear

from the evidence. While that might be sufficient to constitute a prima facie case, there is, in my view, significant evidence from the defence witnesses to at least give rise to a reasonable doubt. I therefore dismiss the charges against the Defendants and find them not guilty.

While that disposes of the charges, I feel compelled to comment further on the by-law, which I believe is laden with further difficulties from an enforcement point of view. To begin with, I agree with the Defendants' arguments that it is vague and over reaching and is based upon fiction as opposed to objective or scientific standard; and the Defendants are entitled to the presumption of statutory interpretation known as non-interference as a result of their ownership of Zeus prior to the by-law coming into force,

I will elaborate on these and other matters that should be of particular interest to the Municipality in an addendum that I will file with the Court and make available to both counsel within the immediate future.

DATED at New Glasgow, Nova Scotia, this 11thth. day of December, 2006.



ROBERT A. STROUD
A Judge of the Provincial
Court of Nova Scotia.

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ADDENDUM

When I delivered by decision in this matter I indicated that I would be filing an addendum to elaborate on difficulties I believe with the enforcement of the Municipal By-Law in question. I will do so under three headings, namely: Constitutional, Statutory Interpretation, and Drafting.

Constitutional.

Although this case was not argued as a constitutional one per se, clearly the issue raised by the defence that the by-law is vague and overreaching brought s. 7 of The Charter into play. It states:

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The test for finding unconstitutional vagueness was first articulated by Gonthier J. in R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, when he stated at pp. 639-40:

"A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary." [Emphasis added.]

In Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.) Dickson

C.J. stated at par 17:

I agree with Lamer J. that vagueness should be recognized as a principle of fundamental justice. Certainly in the criminal context where a person's liberty is at stake, it is imperative that persons be capable of knowing in advance with a high degree of certainty what conduct is prohibited and what is not. It would be contrary to the basic principles of our legal system to allow individuals to be imprisoned for transgression of a vague law"

In my view, the reference to a breed of dog or dogs as intrinsically dangerous in the absence of a clear legal standard to determine the existence of or characteristics of the breed meets the constitutional test of vagueness and, since there is a potential for deprivation of liberty by virtue of s. 25 of the by-law, I believe it infringes s. 7. of the Charter and cannot be saved by s. 1.

I also believe the by-law is overreaching because it deems the breeds referred to in s. 1(d)(3) to be fierce or dangerous. It is a fundamental principle of statutory construction that if the general language of a statute can be read narrowly to avoid an ultra vires effect, that should be done. The Supreme Court of Canada has indicated that

legislation which is open to more than one interpretation should be read down so that it is not inconsistent with the Charter in appropriate cases. (See Lamer J. in Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at p. 1078.)

The effect of the definition is even more potentially egregious when s. 15(b) of the by-law authorizes a constable, peace officer or dog control officer without notice to or complaint against the owner of a dog that is fierce and dangerous to impound it and/or destroy it on sight.

In my opinion s. 1(d)(3) should, at the very least, be read down to provide that the definition is a presumption that may be rebutted by evidence to the contrary.

Statutory Interpretation

Le Dain, J. stated the general rule of statutory interpretation in R. v. Stevens, [1988] 1 S.C.R. 1153 (SCC) when he quoted from Maxwell on the Interpretation of Statutes, 12th ed. at par. 26:

"It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."

He went on to state:

However, it is not always easy to determine whether the statute discloses an intent that it operate retrospectively or gives rise to a necessary implication to that effect. Craies on Statute Law, 7th ed., at p. 387, says that a statute is retrospective if it: "... takes away or impairs any vested right acquired under existing law, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."

In HALIFAX DEVELOPMENTS LIMITED v. RENT REVIEW COMMISSION (1981), 49 N.S.R.(2d) 710 (NSSCAD) MacKeigan, C.J. stated at par. 12:

"In interpreting these provisions the applicable rule is one of strict construction. The following is from Maxwell on Interpretation of Statutes (12th Ed.), p. 251:

"Statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction in the same way as penal Acts. It is a recognized rule that they should be interpreted, if possible, so as to respect such rights, and if there is any ambiguity the construction which is in favour of the freedom of the individual should be adopted. One aspect of this approach to legislation is the presumption that a statute does not retrospectively

abrogate vested rights, another is the presumption that proprietary rights are not taken away without provision being made for compensation....”

Since I am satisfied that the Defendants had a vested right in their ownership of Zeus in the Municipality when the by-law was first enacted, it should be interpreted in accordance with this general rule to avoid interfering with that vested right.

Moreover, the effect of the exemption for Rottweilers in the Feb, 18, 2004 amendments is, in my view, discriminatory in relation to the other dogs specified in the definition of fierce or dangerous.


Drafting

The Defendants were charged with offences under s. 13(d) of the Municipal By-Law. In the event of a conviction the solicitor for the Municipality sought sanctions under ss. 25 and 26 of the by-law. During the course of the trial I was provided with a certified copy of the by-law. In that copy it is stated that upon conviction a defendant is subject to the penalties prescribed in paragraph 24. That is obviously a drafting error as s. 24 deals with a penalty for failure to obtain a dog tag. It also appears that the exception for s. 22 in s. 25 should be s. 23.

Also, s. 26 would have no application in the event of a conviction as it only applies to a charge against an owner of a dog that has, “without provocation attacked (sic) or injured a (sic) domestic animals or persons”. By letter dated November 21, 2006 (prior to the commencement of the trial) the solicitor for the Municipality referred to s. 177 of the Municipal Government Act as authority for such an order. Due to the similarity in the wording of that section with s. 26 of the by-law, it should, in my view, be interpreted to presume that the specific wording in the by-law was intended to override the general nature of s. 177. Otherwise, to provide that a court could order the destruction of a dog that was merely deemed by definition to be fierce or dangerous rather than dangerous in fact would result in the legislation being overreaching and contrary to the principles of fundamental justice as discussed above.

There are also a number of typographical errors in the by law that should be corrected, including the use of the word “attached” instead of “attacked” in several sections.

DATED at Port Hawkesbury, Nova Scotia, this 12th. day of January, 2007.


Robert A. Stroud
A Judge of the Provincial Court
of Nova Scotia