IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Murphy, 2010 NSPC 4

Date: January 8 , 2010
Docket #: 1768747/748
Registry: Sydney

Between:

Her Majesty the Queen

v.

Mathias Thomas Murphy

Judge: The Honorable Judge A.Peter Ross

Heard: October 27, 2009
November 6, 2009

Written Decision: January 20, 2010

Charges: 445(1)(a), 264.1(1)(a) and 86(1) CC

Counsel: Darcy MacPherson, for the Provincial Crown
Doug MacKinley, for the Defence

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Introduction

[1] Matthias Thomas Murphy is on trial for charges under the Criminal Code of maiming a dog (at the date of the incident s.445(a), now s.445(1)(a)), uttering a death threat to its owner, Mr. John Wayne Young (s.264.1(1)(a)) and using a firearm without reasonable precautions for the safety of other persons (s.86(1)).

The Facts

[2] The accused and Mr. Young are neighbours. They refer to their dwellings as trailers, but these are fixed places of abode on a stretch of road in Southside Boularderie, Cape Breton. In between their two trailers is another, referred to at trial as the “blue trailer”, or “Arlene’s”. If it was occupied on the day in question, none of the occupants made an appearance.

[3] Mr. Young lives with Anne Marie Bonnar and daughter S.Y., now 12. They own a dog, a pure white mixed breed terrier named Brownie, which now has three legs.

[4] The accused lives with Ms. Dolly MacLean and her granddaughter S.M., now 10. At the time of the incident he owned 28 free-range chickens. Most were “laying hens”. A sign at the driveway advertised eggs for sale at $2.50 a dozen.

[5] Mr. Young and Mr. Murphy live on opposite sides of the blue trailer. It is about 150 feet from each of the three trailers to the next. Each has its own yard. The properties are not fenced. There is a narrow swath of softwood trees separating the Youngs from the blue trailer with a short path leading through.

[6] On April 6, 2007, which was Good Friday, Mr. Young’s brother, his wife Wanda Luker and their two children came for an afternoon visit. S.Y. and S.M. were playing together, as they often did. As Ms. Luker came in the door, Brownie slipped out. Whether this was the first time such a thing had happened was one of many points of contention. The dog ran toward the children, who were playing on a swing set in the Young’s yard, and then darted through the path toward the Murphy property. Mr. Murphy’s chickens were foraging about in his yard, as they usually did during the day. As a rule they did not venture past the blue trailer, nor out onto the highway. Mr. Young, aware of the unfolding scenario, asked S.Y. to fetch the dog. It appears S.M. went with her. By the time they got over to Mr. Murphy’s yard he had fetched a shotgun. He told them to “get the f*** in the

house". They ran back over to the_Young trailer, exclaiming that Mr. Murphy was going to shoot Brownie. Ms. Luker called all the children inside. Mr. Young ran outside to intervene, but too late. A shot rang out. By the time he got to the dog it was limping back, dragging a hind leg. Mr. Murphy was still holding the gun. The leg was later amputated.

[7] Mr. Murphy was working on his truck when the dog came over. This was not the first time Brownie had paid a visit. On other occasions the dog had come over and killed, at various times, 10 to 15 of his chickens. He had complained about this. He suggested to Mr. Young that he let his dog out only early or late - i.e. either before or after Mr. Murphy let the chickens out of their pen. Indeed, he had warned Mr. Young that he would shoot the dog and Mr. Young, for his part, was so frustrated by the whole thing that he once suggested Mr. Murphy ought to do just that. I don't believe Mr. Young meant this, nor that any reasonable person would construe such a remark as giving permission or authority. Mr. Murphy, however, did exactly what he said he would. He went in for his shotgun. He told S.Y and S.M. to go indoors. He was unaware that there were two other young children visiting the Youngs, but he did ascertain that nobody else was nearby. He located the dog to the rear of his property, between the blue trailer and his own, a few feet to his side of the boundary line. The dog was at the bottom of a small embankment, at the fringe of a sparsely wooded area. A number of photos of the scene were tendered at trial. Mr. Murphy fired from an elevated position, just a few feet from the dog. It was broad daylight. He had a clear view. All but Mr. Young, who was on his way over, and his brother Wayne, who had remained outside on the Young property, were inside the Young trailer. Ms. MacLean was inside the Murphy trailer. As noted there was nobody else in the immediate vicinity; indeed, nobody witnessed the shooting. The direction of fire was away from the dwellings. Any buckshot that missed the dog would have gone into the ground immediately behind it.

[8] Mr. Murphy took careful aim. He initially thought of killing the dog, but instead took aim at its hindquarters. He wished, in his words, "to send a message". He fired once.

[9] Mr. Young alleges that Mr. Murphy threatened him with the words "get out of the way or I'll shoot you too." Assessing credibility is one duty of the trier of fact. In this vein I note the following: (a) Mr. Young says he heard the shot, suggesting he did not see it, in turn suggesting he would not have been in the line of fire. He arrived after Mr. Murphy had inflicted all the damage he wished to, making the alleged threat somewhat at odds with the flow of events. (b) He also claims that Mr. Murphy told S.Y. and S.M. "if you don't get out of the way I'll blow

the head off that dog." Neither girl supports this, and it seems inherently nonsensical. (c) Mr. Young went on to say that Mr. Murphy was at home that afternoon "with a pile of his friends, showing off, half-snapped." This is not supported by evidence of the police who arrived shortly afterwards, nor by any other evidence in the case. If it is a true statement about some other afternoon, it is irrelevant. (d) In light of other evidence in the case I find that this was not the only time the dog had harassed the chickens, as Mr. Young claims. Rather, it had happened a number of times before. (e) Finally, Mr. Young's complaint to police included the statement that his dog had been "playing with the chickens." This might be true in the sense that someone plays with a soccer ball, but not in the sense defined in the Oxford English dictionary as "competing or participating with others in a game." It is possible that Mr. Murphy's chickens occasionally came over into the Young yard (although S.M. says they didn't venture through the patch of trees). If they did, they may well have "tantalized the dog at the window" as Mr. Young claims. Be that as it may, there are a number of reasons to be somewhat suspect of Mr. Young's credibility.

[10] Although I found Mr. Murphy to be truthful in many aspects of his testimony, some of his assertions cannot be accepted. (a) I doubt, for instance, that the dog runs as well on three legs as it did on four. (b) More to the point, I cannot accept the claim that the dog actually killed two chickens that particular day. He tendered a photograph of a dead chicken, saying he was unsure if it had been taken the next day (which would suggest that it was a chicken which the dog had killed just before being shot) or whether it was a photo from a previous occasion. It is difficult to believe he would not remember which. (c) He said he did not have time to check around his trailer for any dead animals because he was in police custody. While he was arrested that afternoon on the complaint lodged by Mr. Young he would have had sufficient time to look around for carcasses. Given the history one thinks he would also have had the inclination to look for evidence to support his view of the situation - to show why he did what he did. (d) Lastly he says that he had complained to the SPCA previously about Brownie coming over and killing his chickens, and was told by an official that in such circumstances he had the right to shoot the dog. Aside from being hearsay, it falls well short of what is required to prove some sort of officially induced error. Defence has not pleaded this. I am left with the sense that here Mr. Murphy is elaborating somewhat in an attempt to defend his actions.

[11] Much evidence at trial concerned distances from one thing to another. Toward the end of the proceedings Crown and defence stipulated an agreement that Mr. Murphy was 65 feet from the blue trailer when he fired the shot, and that it was less than 182 meters from the blue trailer to the dwellings on either side.

(The Crown argues, as I will note hereafter, that this radius has some significance to the case.) Based on the evidence led at trial I am prepared to conclude that Mr. Murphy was less than 182 meters from all three dwellings - the blue trailer, his own and Mr. Young's - when he discharged the firearm.

Application to the charges

[12] Given the foregoing credibility assessment, I cannot accept the allegation of death threat as being proven beyond a reasonable doubt, and Mr. Murphy is found not guilty of the charge under s.264.1.

[13] What was (and was not) found as a matter of fact forms the basis on which I will proceed to deal with the legal issues arising out of the remaining two charges.

[14] The charges left for decision at this point in the analysis are maiming the dog and unsafe use of a firearm.

The 445 charge

[15] At the date of the incident s.445(a) read as follows:

> Every one who wilfully and without lawful excuse (a) kills, maims, wounds, poisons or injures dogs, birds or animals that are not cattle and are kept for a lawful purpose...is guilty of an offence punishable on summary conviction.

[16] The section was amended to make it a hybrid offence, and is now numbered as s.445(1)(a); substantively, however, the offence is the same now as it was then.

[17] By virtue of s.8(3) of the Criminal Code, "every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force . . . except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament." Mr. Murphy has pled "defence of property" from the common law to justify his actions. This is distinct from what is often termed defence of property under sections 38 to 42 of the Code which deal with defensive actions taken against another person.

[18] I will address "defence of property" in the context of the charge of maiming the dog. That will be dispositive of the issue for the s.86 offence as well.

[19] S.445(1)(a) is contained in Part XI of the Criminal Code entitled Wilful and Forbidden Acts in Respect of Certain Property. Animals, whether owned for commercial purposes or as household pets, are regarded as property. This section creates an offence of killing, maiming, etc. an animal kept for a lawful purpose. It would not apply to a stray dog. This reinforces the appropriateness of a property paradigm in analyzing the actions of the parties in the instant proceeding. S. 445.1, by distinction, is one of the "cruelty to animals" provisions that makes an offence of causing unnecessary suffering to an animal, irregardless of ownership.

[20] I have considered the possible application of s.794(2) of the Criminal Code, which applies to summary proceedings, and which says that "the burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant . . ." The Supreme Court considered a similar provision in the former Narcotic Control Act in R. v. Perka [1984] 2 S.C.R. 232, where the defendant raised the common law defence of necessity. At para. 61 the court concluded that the statutory exceptions to which s.794(2) referred did not include common law defences. Mr. Murphy has put sufficient evidence before the court to make defence of property a live issue. Following the logic in Perka the Crown must therefore prove beyond a reasonable doubt that the common law "defence of property" does not apply to Mr. Murphy.

[21] S.429 of the Criminal Code states that "no person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right." Here again the provision, on its face, is misleading. Courts have said that it is unconstitutional to place this onus on an accused - see for instance R. v. Gamey (1993) 80 C.C.C. (3d) 117 (Man.C.A.), R. v. Pena [1997] B.C.J. No. 1386 (BCSC) and R. v. Watson (1999) 137 C.C.C. (3d) 422 (Nfld.C.A.). It is thus for the Crown to prove the absence of justification or excuse where, as here, an accused provides some evidential basis to put these in issue.

[22] Many cases have wrestled with the distinctions between excuse, justification and colour of right. In Mr. Murphy's case there is no misapprehension of fact. His belief accorded with the actual state of affairs. He was clear-eyed about the ownership of the dog, the location of the properties, what had occurred that day and prior, and other material things. Neither is he

arguing that such conduct, though illegal in and of itself, should be excused in his particular case. The issue is justification - whether the court should find that the action he took in shooting and maiming the dog was justified in the eyes of the law.

[23] While the defence made some mention of the possible application of the defence of necessity, I do not think that it arises for consideration. In R. v. Broklebank (2000) 336 A.R. 183 the Alberta Provincial Court considered necessity in the case of a man who shot a cougar which, he contended, posed a threat to persons and livestock. Certain features of this defence bear some resemblance to the defence of property argument, such as the question of whether the accused had some other "legal way out" of his predicament. But while one should give poultry their due, the circumstances here do not suggest the sort of imminent peril that would call into play the defence of necessity.

[24] Cases have held that a person should use reasonable care to avoid injuring a dog which has merely trespassed upon the person's property. People have the right to remove unwanted animals, and unwanted people for that matter, but must act reasonably, using as little force as necessary. However Mr. Murphy contends that Brownie was not merely trespassing.

[25] On the evidence I cannot find that Brownie injured any of Mr. Murphy's birds on the day in question. More to the point, the dog was not in the midst of attacking the chickens when shot. I leave open the question whether shooting a dog would be justified in such circumstances, but not with the intent of encouraging such a practice.

[26] In R. v. Clouter [1990] N.J. No.285 the defendant shot a dog which had attacked his cooped-up chickens. A lady down the street was alarmed by the shots. Mr. Clouter was charged with disturbing the peace under s.175 of the Criminal Code. The defendant pleaded defence of property to justify his actions, and the Newfoundland Supreme Court gave effect to it. The court concluded at para. 8 that "It is unfortunate that such noises cause persons living in the vicinity to be startled and upset, but surely that is the lesser evil in a case such as this where the dog could have destroyed all the poultry had he not stopped the carnage by shooting the animal."

[27] Justice Barry said, at para. 7 that "presumably the framers of the Code did not deem it necessary to include a provision justifying the owner of property on his own land in protecting it from damage or destruction by dogs." Given that the common law "defence of property" was preserved by s.8(3) of the Code the court

adopted this statement of the defence found in Halsbury's Laws of England, 3rd edition:

> Where it is sought to justify the shooting on the ground that it was done for the purpose of protecting animals, the defendant must prove that at the time of shooting, the dog either was actually attacking the animals, or, if left at large, would renew the attack so that the animals would be left presently subject to real and imminent danger unless renewal was prevented; he must prove also that either there was in fact no practicable means other than shooting of stopping the present attack or preventing such renewals, or that, having regard to all the circumstances in which he found himself, he acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack.
>
> A similar rule exists in criminal cases. It is no defence to a charge of unlawfully and maliciously killing, wounding, or maiming a dog, that it was trespassing at the time; but if the accused proves that he bona fide believed that the act was necessary, and that he could save his property or protect himself in no other way, he is entitled to be acquitted. The true test is whether the accused has acted reasonably.

[28] In R. v. Greeley [2001 N.J. No. 207 the defendant contended that he was justified in strangling the neighbour's dog because earlier in the day it had knocked over his son, causing a cut on his head, and because the dog was reputed to be vicious. The court found that the dog was boisterous but not vicious. It attempted to sum up the relevant legal principles at para. 22 as follows:: "an individual has the right to shoot a lawfully owned dog in the face of an attack by that dog on either himself or his property. Once the attack has stopped and there is no reasonable possibility that it will resume the right to kill the dog no longer exists. . . . the killing must be the only practicable way to prevent this attack . . . and must be done in such a manner as to spare the dog any unnecessary suffering." In short, the court appears to have applied the law as set out in Clouter, above.

[29] In R. v. Etherington [1963] 2 C.C.C. 230 the defendant was tried on a charge of wounding a dog without lawful excuse. At para. 16 he court referred to an English case from 1915 in which a dog had entered an area where chickens were kept. The law was summarized as follows : "A defence to a criminal charge

of killing a dog which was trespassing on the property of the accused is made out if it is shown that the dog was killed under necessity for the purpose of protecting the hens . . . and where it is shown that the defendant's property was in peril from the dog at the moment when the shot was fired because of the probability that the dog would attack the hens, it was not obligatory on the defendant to await the actual attack before shooting." While this lends some support to the defence position, I think it still contemplates a situation where no other reasonable course of action is readily available.

[30] In R. v. Klijn [1991] O.J. No.3415 a neighbour's dog got loose and chased the defendant's cattle. The defendant fired shots in the air to scare the dog off, and succeeded in separating it from the cattle. However when the dog did not go home, but remained on his property, Mr. Klijn went out on his ATV and shot it. The court found him guilty of a s.445 offence because at the time the dog was shot it did not pose a threat to the livestock. It stated that the defendant, although understandably upset at previous losses to his livestock, "went beyond what a reasonable and sensible person would have done."

Conclusion on s. 445(a)

[31] Applying the principle as stated in Halsbury's Laws of England to the facts on the ground at Boularderie I find, on the evidence, that the Crown has proven that Mr. Murphy acted without justification or defence. I agree with the Crown's argument that he had less drastic alternatives readily available, such as allowing S.Y. to retrieve the dog and take it home, scaring the dog away by throwing something at it, or even firing a warning shot in the air. In so far as it was an ongoing problem, Mr. Murphy could have complained to the authorities about Brownie running at large and killing his chickens. In fact he did just this after the incident in question, resulting in a conviction against Mr. Young under the municipality's dog bylaw. Whether viewed in the larger context, or the narrower circumstances of that afternoon, Mr. Murphy had other "practicable means" at his disposal to prevent Brownie from attacking his poultry.

[32] There are, in Nova Scotia, certain statutes which allow a person to kill a dog. These include situations where the dog is chasing sheep, or attacking moose, deer, or bear. It appears other provinces may grant a similar right where the animals being attacked are poultry. However none of these is applicable to the case at hand.

[33] For the reasons given above I find the Crown has proven that defence of property does not apply, that Mr. Murphy acted without legal justification. This

being so, and all other elements of the offence being proven, Mr. Murphy is found guilty of this charge.

The s. 86 charge

[34] Lastly, I must decide whether the evidence proves beyond a reasonable doubt that Mr. Murphy "without lawful excuse used a firearm, to wit: a 12 gauge shotgun, without reasonable precaution for the safety of other persons contrary to s.86(1) of the Criminal Code." Needless to say Brownie is not a "person". Unlike s.445, s.86 is species specific.

S. 86(1) reads as follows:

> Every person commits an offence who, without lawful excuse, uses, carries, handles, ships, transports or stores a firearm . . . in a careless manner or without reasonable precautions for the safety of other persons.

[35] A firearm is defined in s.2 as "a barrelled weapon . . . capable of causing serious bodily injury or death to a person . . ." No argument is made about whether the shotgun Mr. Murphy used fits that definition.

[36] I think it is apparent from the reasons given above that "defence of property" is of no avail to the accused on the s.86 charge. However, an interesting point of law arises around the meaning and scope of the phrase "safety of other persons".

[37] Based on the findings of fact above I have little difficulty concluding that the shot fired at the dog posed no risk of physical injury to any other person. Mr. Murphy was not careless or reckless in this regard; rather, he took care to ensure that nobody was in harm's way before firing. Crown, however, in its final submission, suggested that "safety of the public" also includes protection from psychological harm. It contends that people using firearms must not only take proper care to ensure the physical safety of other persons, but must also take reasonable precaution to ensure that psychological harm does not ensue. From this premise the Crown argued that Mr. Murphy knew that S.Y. was nearby, knew that she would probably see the bloody aftermath of the shooting, and ought to have realized that a child would be emotionally distressed as a result.

[38] Perhaps the Crown did not formulate this view of s.86 until the conclusion of the trial, for S.Y. was not questioned about any emotional impact of the event upon her. There is little hard and fast evidence that S.Y. was actually upset or disturbed by what happened.

[39] When the photos of the dog's injuries were tendered I asked whether it would be necessary to show them to S.Y. on the witness stand, wishing to spare her any unnecessary upset. Crown pointed this out is support of its submission that one can reasonably assume that a typical child would be traumatized to some degree by seeing a pet maimed and bloodied, realizing that it had been shot. Thus, arguably, the Crown need not show actual psychological harm any more than it need show actual physical harm in order to secure a conviction under s.86.

Framing the issue

[40] The Supreme Court of Canada discussed s.86 of the Criminal Code in R. v. Finlay [1993] S.C.J. No. 89. The case concerned whether the fault requirement of the section - "in a careless manner" - breached s.7 of the Charter. The court concluded that it did not and annunciated an "objective test for negligence" in criminal cases as being conduct that constitutes a marked departure from the standard of care of a reasonably prudent person. The Court was aware of the decision of Arbour, J.A. in R. v. Durham (1992) 10 O.R. (3d) 596 concerning a careless storage charge under the same section, a case cited by the Crown in its submissions before me. Arbour J.A. said that s.86 was part of an overall regulatory scheme (i.e. Part III of the Code, or "gun control" legislation) whereby a duty was imposed on persons to handle, store and use firearms carefully. Thus the Crown need not prove that an accused possessed a "positive state of mind". Rather, the conduct of an accused is to be measured on the basis of an objective standard.

[41] The section faults conduct "in a careless manner or without reasonable precaution for the safety of other persons." It is difficult to see much distinction between the 'either' and the 'or'. I note that Manning, Mewett and Sankoff, Criminal Law, 4th ed. (2009) at p. 715 seems to deal with both together under the one heading "carelessness". I note also that the Supreme Court in R. v. Gosset [1993] S.C.R. No. 88, a companion case to Finlay, also dealing with the "fault" aspect of s.86, seemed to make no distinction between "in a careless manner" and "without reasonable precaution for the safety of other persons."

[42] In the present case, therefore, the Crown is not required to prove that Mr. Murphy knew that psychological harm could result. In an offence such as this what the accused knew is beside the point; the issue is whether he ought to have known. There is more than enough evidence to prove this mental element of the offence. Finlay, however, did not address the issue here, which is : what did Parliament mean by “safety of the public” in s.86? Put another way, if the phrase “safety of the public” does not extend to psychological trauma suffered by persons who witness the firearm’s use, or the aftermath, but are never themselves in danger of physical harm, then the possibility of such forms no part of the “standard of care” which a person using a firearm must (in law) obey. The dictates of conscience are quite another matter.

[43] By telling S.Y. and his own young daughter to get in the house before shooting the dog, Mr. Murphy displayed an awareness of the possible distress they might suffer by witnessing such an event. S.Y. had seen what he was about to do, had run to her house nearby, and Mr. Murphy knew she might well see the dog immediately afterwards. It is not a great leap to conclude that the action of shooting the dog could have a significant impact on S.Y.’s emotional well-being, and that this was completely foreseeable by Mr. Murphy or any other reasonable person in a similar situation. Put another way, most children would be shocked and upset to see the family pet, knowing it had just been shot by the neighbour, dragging its bloodied hind leg across the front yard and whining in pain, and a reasonable person would realize this. Indeed the consideration should not be limited to children - adults may also be impacted in such a way - but S.Y.’s age does seem to bring the matter into clearer focus.

[44] The case turns on the following. If “safety of the public” in s.86 speaks to physical safety only, Mr. Murphy is not guilty. If, on the other hand, it encompasses the possible infliction of psychological harm to someone whose physical safety was not at risk, Mr. Murphy is guilty of committing a s.86 offence.

[45] Should a distinction be made between psychological harm suffered by a witness to the actual use of a firearm and a witness to the aftermath? The present case concerns the latter, but it is possible to conceive of situations where a person who is not in any danger of physical harm is an eyewitness to a shooting and suffers serious psychological trauma as a result. Would it make a difference to the outcome here if S.Y. had witnessed the shooting of the dog from the safe confines of her house, as opposed to seeing the dog just afterwards? As I see it this distinction makes no difference.

[46] To my knowledge this issue - whether psychological harm unaccompanied by physical harm comes within the ambit of “safety of the public” in s.86 - has not been determined in other courts in Nova Scotia or elsewhere. That being said, I did not solicit briefs on this issue and my own canvas of the law is undoubtedly incomplete. However the task is not conducted in a complete vacuum. I will attempt a brief discussion en route to a conclusion which I think is indicated by a reading of some case law and a consideration of the Criminal Code itself.

Principles of statutory construction

[47] The authors of Manning, Mewett and Sankoff (above) say at page 105 that “filling in legislative gaps regarding the actus reus of offences is one of the primary tasks of the criminal courts.” By way of example courts in Canada have had to determine what meaning to give to “sexual” in the context of sexual assault where the Code contained no definition. Even where Parliament provides a definition the courts are sometimes called upon to refine it. For example in R. v. Covin [1983] S.C.J. No. 53 the Supreme Court concluded that operability should be a component of the statutory definition of “firearm”, and in R. v. Hasselwander [1993] S.C.J. No. 57 the Court determined that “capable” in the definition of “prohibited weapon” means capable of conversion to an automatic weapon in a short period of time.

[48] If there is still a rule of strict construction for criminal statutes, it is no longer a strict rule. So it would appear from Hasselwander. There the court took guidance from s. 12 of the Interpretation Act which exhorts courts to give an interpretation which best ensures the attainment of a statute’s objects.

[49] The rule of strict construction states that if a penal provision is reasonably capable of two interpretations, the interpretation more favourable to the accused must be adopted. At para.30 of Hasselwander the Court cited with approval the words of Martin J.A. in R. v. Goulis (1981) 125 D.L.R. (3d) 137 as follows: “The court is first required to determine the sense in which Parliament used the word from the context in which it appears. It is only in the case of an ambiguity which still exists after the full context is considered, where it is uncertain in which sense Parliament used the word, that the above rule of statutory construction requires the interpretation which is the more favourable to the defendant.”

[50] If the rule of strict construction of penal statutes has been moved to the third line, courts still show caution and restraint in delineating the scope of criminal offences. Prof. Stuart in Canadian Criminal Law 5th ed. (2007) at p.86 *et*

seq discusses a series of cases where the basis of interpretation appears to be "concern for the principle of legality with its emphasis on the need for certainty and the presumption in favour of liberty . . . (and) the overall need to use the criminal law with restraint." He points out that in R. v. Boulanger (2006) 39 C.R. (6th) 1 the Supreme Court held that the accused's actions, while possibly unethical, did not rise to the level of seriousness required to establish the offence. In R. v. Labaye (2005) 34 C.R. (6th) 1 the Supreme Court stated that indecent conduct as contemplated by s.210 of the Code must cause harm or present a significant risk of harm in a fundamental way - which may include physical or psychological harm to persons involved in the conduct - provided the harm is of such a degree that it is incompatible with the proper functioning of society. In R. v. Lohnes (1992) 10 C.R. (4th) 125 the issue concerned the meaning of disturbance in a public place - whether it should broadly include emotional upset, or more narrowly refer to an externally manifested disturbance of the public peace. The narrower definition was adopted, given the need to balance the goals of the legislation with the proper limits of the criminal law.

[51] Other cases before the Supreme Court where the "modern" principle of statutory construction was considered and applied include Bell ExpressVu v. Rex [2002] S.C.J. No. 43 (see para 26) and Re Application under s.83.28 of the Criminal Code [2004] 2 S.C.R. 248 (see para 34). Courts are to consider the entire context of statutory words and phrases and read them in harmony with the object of the legislation. This relegates some other principles of construction to a subordinate or secondary role and the 'strict construction of penal statutes' rule is applied only where there is ambiguity as to the meaning of a provision (see Bell ExpressVu at para 28).

[52] The following passage from Driedger on the Construction of Statutes 3rd ed. (1994) is often cited :

> An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text (b) its efficacy, that is, its promotion of the legislative purpose and (c) its acceptability, that is, the outcome is reasonable and just.

The regulatory context

[53] S.86(1) must be distinguished from s.86(2) which creates an offence of contravening a regulation made under the Firearms Act concerning storage, handling, etc. of firearms. This section has proven controversial in that it seems to import a strict liability offence into the criminal law. This was the holding, indeed, in R. v. Smillie [1998] B.C.J. No. 2082 (BCCA) wherein it was stated at para 35 that "the offence ... in the case at bar does not require negligence as part of the actus reus". The offence is made out simply by proof that the accused failed to abide by the regulations (although due diligence is available as a defence). The judgement includes discussion of the differences between s.86(1) and 86(2).

[54] In the present case the Crown has argued that certain regulations are important, not as an element of the offence *per se* (as under s.86(2)) but rather as a contextual element in determining the meaning of "safety of the public". Courts have had regard to applicable regulations in deciding upon the appropriate standard of care for use, storage, etc. - see for instance R. v. Blanchard [1994] Y.J. No.135. In Mr. Murphy's case the Crown points out that the Firearm and Bow Regulations made under the provincial Wildlife Act prohibit the discharge of a shotgun within 182 meters of a dwelling. Mr. Murphy was well within this distance of all three of the trailers. Breach of the regulation does not, by itself, render him guilty of the offence under s.86(1) but the Crown argues that this provision, like the one which prohibits firing guns within 804 meters of a school, was enacted in recognition of the distress which can result when children hear a weapon being fired, regardless of whether they are in actual danger of being hit. Crown contends that the rationale for these provincial regulations is not just the physical safety of other persons but concern for their psychological well-being. I agree that no-hunting zones give homeowners and school goers peace of mind, and that such restrictions are rooted in notions of safety. I must also be mindful that Mr. Murphy is on trial for a criminal offence; he is not charged with breaching the Wildlife Act.

Other Criminal Code provisions

[55] There are other provisions of the Criminal Code which employ the phrase "safety of the public" or use similar terminology. Before making brief mention of some of them I think one must first draw a distinction between the sentencing provisions in Part XXIII with those parts of the Code which create and define criminal conduct.

[56] Sentencing is in part designed to secure good behaviour. The “safety of the public” is a phrase which one often hears in the sentencing context. More specifically s.718, which sets out the fundamental purpose of sentencing, mentions “the maintenance of a just, peaceful and safe society”. However this does not mean that every unjust act, every aggressive word, and every unsafe behavior constitutes criminal behavior.

[57] S. 742.1 provides for a conditional sentence of imprisonment where the court is satisfied it would not “endanger the safety of the community”, a phrase very similar to “without precaution for the safety of other persons”. S.742.1 has been interpreted by the Supreme Court in R. v. Proulx [2000] 1 S.C.R. 61 to include the risk of causing psychological harm to others by reoffending. However this section casts a net over the entire criminal code; my task is to consider the meaning of the phrase “safety of other persons” in one particular section.

[58] Victims of crime are addressed in the sentencing provisions. Under s.722(4) a victim includes a person “who suffered physical or emotional loss as a result of the commission of the offence.” In R. v. Duffus 40 C.R. (5th) 350 the Ontario Court of Appeal said a victim includes a person affected in an emotional way including members of the direct victim’s family. This gives a broad scope and holds the offender accountable for the effect of his or her criminal acts on others besides the “direct victim” of the offence. This confirms that someone may suffer harm, and thus be a victim under s.722, as a result of an offence being committed but without being the direct object of the criminal conduct. We know, for instance, that a child who witnesses a spousal assault is victimized. But does that mean that the offender has committed an assault upon the child?

[59] Where a s.810 recognizance is being ordered (a so-called “peace bond”) the court is required to consider whether a firearms prohibition is desirable in the interests of the safety of the defendant or any other person. A similar provision is found in 810.1 and 810.2. However these sections do not define an offence; rather, like the sentencing provisions, they are designed to maintain peace and good behavior and contemplate a wide range of possible activity.

[60] Where a discretionary prohibition order is made under s.110 to keep firearms out of the hands of an offender for some period of time, the sentencing court is required to consider the “safety of the person or of any other person”. This terminology is found in other sections dealing with prohibition orders. S.117.04 uses similar words to describe the threshold test for granting warrants to search and seize weapons. Here again the sections seem designed to prevent

future harm and thus may require a broad interpretation of "safety" in the achievement of that purpose.

Guidance from other substantive offences

[61] S. 219 defines criminal negligence to be an act or omission which shows wanton or reckless disregard for the lives or safety of other persons. However, in distinction to s.86 any offences predicated on criminal negligence require actual consequences which in turn limits the extent to which this bad behaviour is criminalized. An offence under s.86(1) requires only the risk of adverse consequences.

[62] S.248 couples the phrase "with intent to endanger the safety of any persons" with the phrase "that is likely to cause death or bodily harm to persons."

[63] S.249 creates the offence of dangerous driving, described generally as operation of a motor vehicle in a manner that is "dangerous to the public". The offence does not require consequences (although where bodily harm or death results the penalties are higher). The Supreme Court considered the *actus reus* of this offence in R. v. Beatty [2008] 1 S.C.R. 49. It is not necessary for the Crown to establish that the lives or safety of others were actually endangered, nor that the driving had any actual adverse consequences. Although the "nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that ... might be expected" are taken into consideration in doing an objective assessment of the accused's driving, it is the risk, the possibility of harm which matters. Someone who witnesses a pedestrian being run down in a crosswalk by a speeding car, or someone who happens on a gruesome crash to assist wounded and bleeding passengers might well suffer psychological trauma caused, in a certain sense, by the dangerous driving. But is this the harm which Parliament was concerned about when it created the offence of dangerous driving? There is a risk inherent in many crimes that they will cause mental distress to those to witness them, or who witness the immediate aftermath, but is it this risk which justifies criminalizing the originating conduct? Or is it the more definable and immediate risk of physical injury or death?

[64] Under s.434.1 a person commits an offence by burning his or her own property "where the fire . . . threatens the health, safety or property of another person." Should this be interpreted to include the safety of a witness, for instance a little girl who watches through her bedroom window while the neighbour burns down his own house (assuming, of course, that the girl's house is not in danger of catching fire)?

[65] In Part XXIV of the Code concerning dangerous offenders a serious personal injury offence is defined at s.752 to involve conduct “endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person.” One might argue that “safety” and “psychological damage” must mean different things in this section, otherwise the second of the two clauses would be superfluous.

[66] S.264, criminal harassment, prohibits conduct which causes the other person “to fear for their safety.” Judicial consideration of this section has given rise to such terms as “psychological security” - R.. v. Pennell [2007] O.J. No. 1654 and “psychological violence” - R. v. Finnessey (2000) 135 O.A.C. 396. A leading case is R. v. Sillipp (1997) 120 C.C.C. (3d) 120 (Alta. C.A.) followed by the British Columbia Court of Appeal in R. v. Ryback (1996) 105 C.C.C. (3d) 240, holding that the meaning of safety in this section extends beyond physical safety and includes “psychological safety”**.** However the section differs from s.86 in that the conduct must be directed to a particular person. By contrast, s.86 addresses conduct which presents a more general “public” danger (although it suffices if only one member of the public is put at risk)**.**

Assessing the risk of harm

[67] Because s.86 is a “risk” offence, if I may call it that, instruction may come from the following passage in Labaye, the case where the Supreme Court discussed the shift to a “harm-based rationale” for s.210, comments which I think may have application here:

> Where actual harm is not established and the Crown is relying on risk, the test of incompatibility with the proper functioning of society requires the Crown to establish a significant risk. Risk is a relative concept. The more extreme the nature of the harm, the lower the degree of risk that may be required to permit use of the ultimate sanction of criminal law. Sometimes, a small risk can be said to be incompatible with the proper functioning of society. For example, the risk of a terrorist attack, although small, might be so devastating in potential impact that using the criminal law to counter the risk might be appropriate. However, in most cases, the nature of the harm engendered by sexual conduct will require at least a probability that the risk will develop to justify convicting and imprisoning those engaged in or facilitating the conduct. (para 61)

[68] Transposing these comments to the matter at hand, and applying the Crown's proposition that the risk of psychological harm comes within the ambit of "safety of the public" in s.86, one might paraphrase the foregoing text to read "the nature of the harm engendered by using the firearm will require at least a probability that psychological harm will develop to justify convicting and imprisoning those engaged in the conduct". Obviously we are not here concerned about psychological harm to someone who is also physically harmed, but psychological harm in and of itself, whether by witnessing the careless use, or by encountering some terrible aftermath of the careless use.

[69] Determining the probability of stand-alone psychological harm, or the severity of such, from careless firearms use is not an easy task. There is no class of people who are at particular risk, no group especially vulnerable to such harm. I am not aware of any studies showing that someone who witnesses havoc occasioned by a firearm suffers more psychological trauma than someone who witnesses similar havoc occasioned by other means.

[70] Let us assume, for instance, that a man shoots at and destroys a bicycle left on his lawn because he objects to the fact the neighbour's child habitually trespassed with it. Might this cause more distress than injuring a pet? Might it depend on the individual child, the age of the child, the economic status of the family, etc.? On what basis do we conclude that the distress is more severe than if the bicycle were smashed with a stick? Should the law create a distinct crime out of the distress caused to the person who used the bicycle or loved the dog? One or the other, neither, both? Is psychological harm to be presumed in every case? It may be fairly clear that emotional distress was caused in the case under discussion here, but what of the myriad other situations which could arise? How much would be caught by the reading of s.86(1) urged by the Crown?

Restraint in the use of the criminal law

[71] In Lohnes the Supreme Court asked whether foreseeable emotional upset sufficed to create the "disturbance" aspect of the offence. I am mindful of the difference between this and s.86, and the need to consider an individual's freedom of expression in determining what behavior should be criminalized under s.176. At the same time the Court found that it was not Parliament's objective to protect individuals from emotional upset when it created and defined the offence of "creating a disturbance". At para, 29 the court spoke of the "precarious terrain of pondering the proper goals and limits of the criminal law "and said further that

"our society has traditionally tolerated a great deal of activity on our streets and byways which can and does disturb and annoy others sharing the public space."

[72] People might witness a shooting on a city street, an assault in a bar, or cruelty to an animal, but such witnesses are not thereby the object of the criminal behavior. Even a more inchoate offence such as disturbing the peace or dangerous driving contemplates an identifiable group of people who could be directly disturbed or endangered by the behavior of the accused, not someone who might be upset by seeing the accused's behavior on the evening news.

[73] Comments made above concerning s.249 and s.434.1 are relevant under this heading.

The inherent characteristics of firearms

[74] Part III of the Code deals specifically with firearms and certain other weapons, presumably because of the particular dangers they pose. This in turn informs the meaning to be ascribed to "safety" in s.86. Hypothetically Mr. Murphy could have maimed the dog just as much and just as graphically with an axe or a butcher knife, but I cannot think of any offence which he would thereby commit against S.Y..

[75] In the somewhat dated case of R. v. Cannon (1977) 37 C.C.C. (2d) 325 (Ont. C.A.) the accused was charged with using a firearm in a manner that was dangerous to the safety of a police officer contrary to what was then s.86(b). While significantly different on the facts the following comment of Martin J.A, at para. 8 may be instructive : "It is, I think, clear, when s.86(b) is examined with reference to its context, that the danger to the safety of others from the use or possession of firearms which the paragraph seeks to prevent is the danger represented by the nature or characteristics of firearms which make them inherently dangerous instruments." Firearm is defined in s.2 of the Code according to such characteristics, i.e. the capability "of causing serious bodily injury or death."

[76] In Covin (above) which dealt with the charge of using of a firearm during the commission of an offence, Lamer, J. said "the purpose of s.83 is to protect the victim of the commission of an offence from serious injury or death by discouraging . . . the use, by him who commits the offence, of a firearm that is capable of being fired. It has been said that s.83 is not only aimed at preventing injury but also to prevent the cause of alarm. With respect I do not agree. Had

that been the section's purpose, Parliament would have included imitations of firearms . . ."

[77] Section 83 (now s.85) stated that anyone who "uses a firearm while committing an indictable offence . . . whether he causes or means to cause bodily harm .. is guilty of an offence." It appears that the section was subsequently amended to expressly include the use of an imitation firearm, possibly in response to the decision in Covin. Section 86 (numbered s.84(2) at the time of Covin) has *not* been so amended.

[78] Section 85 expressly mentions "bodily harm" and thus it may be argued that the section was directed to that type of harm only. One might also argue that the risk of harm is not quite so general as in s.86(1), being to whomever is victimized by the underlying indictable offence. Be that as it may, the offence created by s.85 is still predicated upon the risk inherent in the use of firearms, and I consider the interpretation in Covin to be informative of s.86 as well. Notably, Parliament has not amended s.86 to include imitation firearms, even though the use of an imitation firearm could cause severe psychological trauma to a witness. Imagine, for instance, a child witnessing a home invasion where an imitation pistol is held to the head of a parent. No doubt an offence is committed against the parent, but once again I can think of no offence in law committed against the child who witnesses such a horrible event. Rather, the law would take account of the presence of the child as an aggravating circumstance at the sentencing of the offence against the parent.

Conclusion on s.86(1)

[79] For the reasons outlined above I conclude that psychological trauma to someone who is not in danger of physical injury or death is not included in the meaning of "safety of the public" in s.86(1) of the Criminal Code. Accordingly, Mr. Murphy is found not guilty of this offence.

Dated at Sydney, Nova Scotia, this 8th day of January, 2010.

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A. Peter Ross, J.P.C.