

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. MacFarlane, 2008 NSSC 8

Date: 20080111

Docket: SY 279421

Registry: Yarmouth

Between:

Her Majesty the Queen
By Her Municipality of the
District of Yarmouth

Appellant

v.

James Foster MacFarlane

Respondent

Judge: The Honourable Justice Glen G. McDougall

Heard: September 6, 2007, in Yarmouth, Nova Scotia

Counsel: James Dewar, Q.C. and Plamen Petkov, on behalf of the appellant
Philip J. Star, Q.C., on behalf of the respondent

By the Court:

[1] This is an appeal of a decision of His Honour Judge John R. Nichols, a Judge of the Provincial Court of Nova Scotia, made on the 8th day of March, A.D., 2007.

[2] The Learned Trial Judge ordered a stay of proceedings for James Foster MacFarlane (the “respondent”) who was charged that he:

on or about the 10th day of March, 2006, at, or near 514 Hamilton Road, Pleasant Valley, Yarmouth County, Nova Scotia, did harbour, keep or has the care and control or direction a dog that is fierce or dangerous, pursuant to Section 17(6) of the Dog By-Law D-048-02 of the Municipality of the District of Yarmouth”

[3] The stay of proceedings resulted from a preliminary motion brought by the defence to quash the charge. Since both the prosecution and the defence were in agreement on the facts there was no need to call witnesses to give evidence.

[4] After tendering a copy of the Municipality's Dog By-Law, D-048-2 as an exhibit, the following facts were presented to the Court:

- (1) The accused is alleged to have contravened Section 17(6) of the By-Law which reads:

17. Every owner of a dog

- (6) who harbors, keeps, or has under care control or direction a dog that is fierce or dangerous;

is in contravention of the By-Law;

- (2) It was the accused first alleged offence under this section of the By-Law;

- (3) The accused received a summons to appear in Court in answer to the charge but he had not been given a notice identifying a place where he could pay the sum of \$30.00, for a first time offence, within 14 days of the date of the notice and thereby avoid prosecution for the alleged contravention of section 17(6) as provided for in section 29 of the By-Law which reads:

29. Any person who contravenes Sections 17(1) (3) (4) (6) & (7) of this by-law and who is given notice of the contravention may pay to the Municipality, at the place specified in the notice, the sum of \$30.00, for a first time offense, within 14 days of the date of the notice and shall thereby avoid prosecution for that contravention.

[5] The defence motion to quash the charge was based on the Municipality's failure to give the accused notice of the contravention pursuant to section 29 of the By-Law. As a result, the accused was not presented with the option of paying \$30.00, for a first time offence, within 14 days of the date of the notice, and was thus denied the chance of avoiding prosecution. The defence argued that the Municipality had an obligation to give the accused this notice.

[6] The Crown argued that the Municipality was not obliged to give notice under section 29. Rather, it had a discretion, depending on the circumstances giving rise to the charge, to either give the section 29 notice or to proceed by way of prosecution under section 28.

[7] The trial judge was urged to consider the wording of the relevant sections read in their entire context and to also consider the purpose of the legislation.

[8] After hearing the arguments of counsel, the trial judge ruled that notice under section 29 was mandatory. Because the Municipality had failed to do so, the proceedings against the accused were stayed. There was some confusion amongst counsel concerning the effect of the Court's ruling. The trial judge made it clear that he was not dismissing the charge but rather only ordering a judicial stay of proceedings.

ISSUES

[9] The issues for this Court are:

- (1) Did the Learned Trial Judge err in law in finding that the notice under section 29 of the Dog By-Law was mandatory?
- (2) Did the Learned Trial Judge err in law in finding that section 29 of the Dog By-Law was applicable to the case at bar?

DISCUSSION

[10] Section 7 of the *Summary Proceedings Act*, R.S.N.S. 1989, c. 450, as amended, engages the provisions of the **Criminal Code** for offences punishable on summary conviction. An appeal from a stay of proceedings on an information is governed by section 813(b) of the **Criminal Code**. Section 813(b) states:

813. Except where otherwise provided by law,

...

(b) the informant, the Attorney General or his agent in proceedings under this Part may appeal to the appeal court

- (i) from an order that stays proceedings on an information or dismisses an information,
- (ii) against a sentence passed on a defendant, or
- (iii) against a verdict of not criminally responsible on account of mental disorder or unfit to stand trial,

and the Attorney General of Canada or his agent has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province or his agent has under this paragraph.

[11] The ruling by the trial judge results from his interpretation of the By-Law. The Nova Scotia *Interpretation Act*, R.S.N.S. 1989, c. 235, as amended, defines “enactment” in subsection 7(1)(e) to mean “an Act or a Regulation”. “Regulation” is defined to include a By-Law in section 7(3) of the *Interpretation Act*.

[12] Under the general heading of “Interpretation of words and generally” subsection 9(5) of the *Interpretation Act* states:

- 9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
- (a) the occasion and necessity for the enactment;
 - (b) the circumstances existing at the time it was passed;
 - (c) the mischief to be remedied;
 - (d) the object to be attained;
 - (e) the former law, including other enactments upon the same or similar subjects;
 - (f) the consequences of a particular interpretation; and
 - (g) the history of legislation on the subject.

[13] In the text “Sullivan and Driedger on The Construction of Statutes”, Fourth Edition, by Ruth Sullivan, Butterworths Canada, 2002, the author at p. 1 wrote:

More than twenty-five years ago, in the first edition of the Construction of Statutes, Elmer Driedger described an approach to the interpretation of statutes which he called the modern principle:

‘Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.’ – Elmer A. Driedger, *The Construction of Statutes* (Butterworths, 1974), at p. 67.

[14] Mr. Driedger’s views on statutory interpretation reflect the historical evolution that has taken place over time. It is consistent with the way the caselaw has developed and conforms to the approach contained in most interpretation acts found in the various jurisdictions throughout Canada including the Nova Scotia *Interpretation Act*.

[15] Not everyone has accepted the Driedger approach. There has been a lively debate about the relationship between his modern principle and the so-called plain meaning rule. In her text referred to above, Ms. Sullivan at p. 9 wrote:

The plain meaning rule means different things to different people, but its proponents generally agree on the following propositions:

1. Upon reading a legislative text it is possible to determine the meaning of the text and whether it is plain or ambiguous.
2. If a text has a plain meaning, extra-textual evidence of legislative intent (like legislative history or presumed intent) is inadmissible to contradict that meaning. The plain meaning constitutes definitive evidence of legislative intent and it is impermissible to rely on other factors to contradict it. Further, other factors may not be relied on to “create” ambiguity – that is, cast doubt on the meaning of a text that is otherwise plain.
3. If a text is ambiguous, interpretation is required. In interpretation, extra-textual factors such as legislative history and presumed intent may be relied on to resolve the ambiguity.

The author then goes on to state also on p. 9:

Judges often rely on the plain meaning rule without formally invoking it or acknowledging its role in their analysis. When judges refuse to look at evidence of legislative intent on the grounds that the text is clear, they effectively rely on the plain meaning rule. When judges say that the headings of an enactment or its legislative evolution may be used to resolve ambiguity but not to create it, they are relying on the plain meaning rule. Although the plain meaning rule has been repeatedly discredited, it continues to permeate both the substance and the rhetoric of statutory interpretation.

[16] In the case of **Rizzo and Rizzo Shoes Ltd. (Re)**, [1998] 1 S.C.R. 27, Iacobucci, J. referred to Driedger's modern principle and stated at para 21:

... that statutory interpretation cannot be founded on the wording of the legislation alone.

[17] In light of this and various other decisions on the subject, the plain meaning of the legislation is obviously important but it must be read as Elmer Driedger said earlier, "*in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*" This approach also corresponds with the requirements of subsection 9(5) of the *Interpretation Act*.

[18] In deciding whether the ruling of the trial judge was an error of law, it is necessary to look at the relevant section (section 29) in context. There are two sections dealing with penal provisions in the Municipality's By-Law. Section 28 states that:

28. Any person who contravenes any provision of this By-Law is punishable on summary conviction by a fine of not less than \$100.00 and not more than 41,000.00 and to imprisonment of not more than 45 days in default of payment thereof.

[19] I need not repeat verbatim section 29. Suffice it to say that reading it in the overall context of the By-Law and, with particular reference to section 28, one cannot but conclude that the Municipality has a discretion to present an option to first time offenders to avoid prosecution for alleged offences under subsections 17(1), (3), (4), (6) or (7) of the By-Law. Once the Municipality exercises its discretion it is then up to the accused person, provided it is a first offence, to pay the \$30.00 penalty within 14 days of the date of notice and thereby avoid prosecution or else proceed to trial. Nowhere in section 29 is there any use of the word "shall" or "must" which one would

normally associate with a mandatory obligation to do or refrain from doing something. To give this section the meaning urged upon the Court of first instance by the defence would potentially lead to an absurd result. No matter how serious the alleged infraction under subsections 17(1), (3), (4), (6) or (7), a first time offender could always avoid prosecution. This interpretation would seriously undermine the purpose and the object of the By-Law.

DECISION

[20] The trial judge's decision to grant a stay of proceedings was based on an incorrect interpretation of section 29 of the Dog By-Law passed by the Municipality of the District of Yarmouth. The Municipality was not obliged to give the section 29 notice to the accused. Therefore, both issues raised on appeal can be answered in the affirmative. As a result of this error of law the order granting a stay of proceedings is set aside and the matter returned to the Provincial Court for trial before another judge.

[21] I should also comment on the Crown's second line of argument in which it was suggested that if this Court decided that section 29 was mandatory then, based on the wording of the By-Law, it would only be available to the accused if he had been charged with offences under all five subsections of section 17. Such an interpretation would produce an absurd result and could not possibly have been intended by the drafters of the By-Law. However, consistent with the trial judge's suggestion, I, too, feel that there could be improvements in the wording of the By-Law. This has not, however, fettered the ability of this Court to interpret the intent and object of the By-Law. The Municipality has a discretion under section 29 and in this instance it has exercised that discretion not to give notice.

McDougall, J.