Citation: *City of Whitehorse* v*. Parry*, 2006 YKTC 101 Date: 20061030
Docket: 05-06647A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Faulkner

City of Whitehorse

v.

Nicole Parry

Appearances:
Lori Lavoie — Counsel for City of Whitehorse
Nicole Parry — Acting on her own Behalf

REASONS FOR DECISION

[1] On January 22, 2006, a dog owned by the applicant, Nicole Parry, was allegedly involved in an incident with another woman and her dog, which led to a complaint to City of Whitehorse animal control officers. A ticket was issued to Ms. Parry for an offence contrary to s. 101 of the Whitehorse Animal Control Bylaw, which provides that:

> No owner of a dog shall permit such dog to bite any person, and where such dog has bitten any person it shall be deemed to have been done with the consent of the owner.

[2] The ticket was served on Ms. Parry on January 26, 2006. On January 27th, Ms. Parry submitted a not guilty plea and a trial date was set in Territorial Court for March 21, 2006. On March 21st, Ms. Parry requested an adjournment of the trial and the matter was rescheduled for April 18, 2006. On

that day, Ms. Parry appeared for trial. The City requested an adjournment on the basis that they wished to further investigate the matter. Ms. Parry opposed the adjournment. The presiding Justice of the Peace granted the adjournment based on the City's request and also, it appears from the transcript of this decision, because Ms. Parry wanted to tender a report from a person who had examined her dog and apparently was prepared to offer an opinion regarding its dangerousness. The JP felt this report could potentially be of assistance to the Defendant's case, but an adjournment would be necessary as the author of the report was not available on April 18, 2006.

[3] In the result, the trial was further adjourned to April 25th to fix a new trial date. Prior to that date, Ms. Parry received notice from the City that it was withdrawing the charge, apparently because of a perceived constitutional problem with s. 101.

[4] Shortly thereafter, the City began proceedings under ss. 84 through 91 of the Animal Control Bylaw to have Ms. Parry's dog declared a dangerous dog.

[5] Under the bylaw, if a dog is declared a dangerous dog, the owner, should she wish to keep the dog, becomes obligated to, among other things, neuter the dog and to keep the dog securely enclosed and muzzled and leashed when outside the enclosure. The owner is also obligated to obtain liability insurance to cover any injuries caused by the dog.

[6] Notice of the City's intention was given to Ms. Parry on May 5, 2006. As permitted by the bylaw, Ms. Parry submitted her reasons why the dog should not be declared dangerous.

[7] By May 26th, Ms. Parry received notice that her dog was being declared dangerous by the Manager of Bylaw Services. As the bylaw provides, Ms. Parry was given 10 days to appeal the decision to this court. She appealed. By June 19th the appeal had been set for hearing on October 10, 2006.

[8] It appears that the earliest available date that would have been suitable for the City, having regard to the availability of witnesses, their counsel and open court time would have been mid-September. The City contacted the Parrys who advised they would be away in the later half of September and requested another date. In the result, the date of October 10th was fixed for the appeal.

[9] On September 28, 2006, Ms. Parry gave notice that, on the date set for the appeal, she would seek a stay of proceedings based on alleged breaches of her rights pursuant to ss. 7, 11(a), (b) and (h) and 12 of the *Canadian Charter of Rights and Freedoms*. Subsequently, a second motion was filed seeking a stay on the basis of late disclosure by the City.

[10] These applications raise many interesting questions, not all of which were touched on by the parties in argument.

[11] First, assuming a stay was granted, what would be the effect considering that the proceedings are, after all, an appeal by the applicant? Presumably she would expect a declaration that the decision of the Bylaw Manager was of no effect, but this is far from clear.

[12] Second, are these the types of proceedings which actually engage the Charter interests of the applicant? They do not result in any conviction – except, I suppose, for the dog. There is no fine or other penal consequence except in a very roundabout sense. What the bylaw effectively says is that if you want to keep a dangerous dog (hardly a right protected by the Charter), you can only do so subject to providing adequate fencing and other control measures.

[13] In *R.* v. *Wigglesworth,* [1987] 2 S.C.R. 541, the Supreme Court of Canada set out a two-prong test to determine whether or not a proceeding falls within the ambit of s. 11. Section 11 applies, first, where a matter is by its very nature, a criminal proceeding; or second, where a conviction in respect of the offense may lead to a true penal consequence.

[14] It is difficult to see that the case at bar could satisfy either prong of the *Wigglesworth* test.

[15] The matter at hand is not, by nature, a criminal proceeding. Rather, it is an appeal from an administrative decision. The preamble to the Animal Control Bylaw indicates that the purpose of the bylaw is to regulate and control domestic animals. The ”sanctions” provided for in sections 92 through 96, and 104 are not punitive, but are imposed as part of a scheme for regulating an activity in order to protect the public. The dangerous dog designation procedure set out in sections 84 through 91 is largely an administrative process which culminates in an appeal to the Territorial Court. The appellant is not charged, nor arrested, nor summoned to appear before the court, nor facing a criminal record. At worst, following the appeal to the Court, the appellant’s dog remains designated as dangerous.

[16] Section 131 of the Animal Control Bylaw states that “any person who contravenes any provision of this bylaw is guilty of an offence”. However, the appellant cannot be said to have “contravened any provision” of the bylaw by exercising her right to appeal. Nor can it be said in any real sense, that she is being prosecuted by the state. The designation of a dangerous dog, and the subsequent conditions that attach to ownership clearly fall within the City’s stated objective of regulating and licencing domestic animals. The withdrawl of a licence or privilege is not within the scope of s. 11; *Gonzalez* v*. Alberta (Driver Control Board)*, 2001 ABQB 757, *Thomson* v*. Alberta (Transportation and Safety Board)*, 2003 ABCA 256. Moreover, in this case, the licence to keep the dog has not been withdrawn, just modified.

[17] Nor does the appellant face a “true penal consequence” in the form of imprisonment or a fine imposed for the purpose of redressing the wrong done to society at large. In fact, she faced neither imprisonment nor fine in the current proceeding.

[18] However, both parties proceeded on the assumption that the Charter applies, so for the purpose of disposing of the motions, I am prepared to assume, without deciding, that these proceedings attract Charter scrutiny.

[19] The main thrust of Ms. Parry's argument was that there should be a stay because she had not been tried within a reasonable time as required by s. 11(b) of the Charter.

[20] I agree with the applicant that the time should run from the time of the first charge, notwithstanding that the City eventually dropped that charge and decided to proceed in a different fashion. As such, the delay is in the order of eight and a half months from January 26, 2006 to October 10, 2006 – the date the appeal would have proceeded, but for the present applications. Of this time, approximately somewhere between a month and six weeks can be laid at the door of the applicant, leaving approximately seven months arguably the result of the City's actions and institutional delay. Of this time, some of the delay was mutual, since the April 18th adjournment, though opposed by Ms. Parry, was also to her benefit because she was not really ready for trial.

[21] While it is true that the matter would have proceeded more quickly had the City got its tackle in order, the delay here is clearly not of a length that would attract Charter scrutiny unless, I suppose, one could argue that in a case involving a dog, the time should be multiplied by seven to convert it into dog years.

[22] It must be remembered that the dangerous dog designation process itself takes some time. A report is filed. Notice is given to the owner. The owner has 10 days to respond. The manager has 30 days to make a decision. The owner has further time to appeal. Then the appeal must be set down for hearing.

[23] The applicant also claimed breaches of ss. 7, 11(a) and 12 of the Charter. The initial claim of a breach of s. 11(d) was abandoned by the applicant.

[24] It appears that the claimed breaches of s. 7 and 11(a) were based primarily on the length of time the proceedings have taken. As such, the claims are answered by my finding with respect to s. 11(b).

[25] The claim of a breach of s. 12, the right not to be subjected to any cruel and unusual treatment or punishment, is clearly without merit. Even allowing the widest possible meaning for the term treatment, imposing safety requirements on persons choosing to keep dogs found to be dangerous, does not amount to cruel and unusual treatment. Of course, the Parrys also claimed that the publicity, the stress, the time and expense of dealing with the matter also constituted cruel and unusual treatment or punishment. However, nothing that has occurred here is outside the realm of what might ordinarily be expected when a person finds herself involved in a court proceeding.

[26] The final claim made by Ms. Parry is that the City has failed in its obligation to make full disclosure as mandated by the Supreme Court of Canada decision in *R.* v*. Stinchcombe,* [1995] 1 S.C.R. 754.

[27] It appears that certain notes made by the bylaw officers in this case were only disclosed to Ms. Parry on October 9th, the day before trial. These notes apparently related to, amongst other things, the efforts of Bylaw Officer Howell to get the matter set for hearing. As such, it could be argued they had no particular relevance until the City was faced with the Charter application alleging unreasonable delay and that the failure to disclose was, thus, understandable. However, the newly disclosed material also included information that doctors attending the person Ms. Parry's dog allegedly bit could not say which of the two dogs involved did the biting. This information was clearly relevant and, indeed, of benefit to the applicant. Clearly it ought to have been disclosed. The description by Cst. Howell of her method of determining what information to forward to prosecutors suggests a lack of appreciation of the City's obligations in this regard, which may extend beyond the present case and is worthy of review by the City and those like Ms. Lavoie engaged to prosecute bylaw cases.

[28] There has clearly been late disclosure here, but what is the remedy? The applicant seeks a stay. However, a stay is the option of last resort, reserved for the clearest of cases. The remaining options are exclusion of the evidence and adjournment. Exclusion is not apt here since the evidence is potentially of benefit to the applicant. Adjournment is in my view a sufficient cure for the problem. Since the trial did not proceed on October 10th, owing to the Charter application by Ms. Parry, there will inevitably be some delay before a new date can be found. That time will allow the applicant to assess the evidence and determine if she wishes to make use of it.

[29] There is a societal interest in having matters heard on their merits and that, in my view, is what should happen here.

[30] I understand and accept that the Parrys have found dealing with this matter stressful. Court proceedings generally are. I also accept that they have been put to trouble and expense. However, it is accepted in our society that the citizen may well have to shoulder that expense. It appears as well that a considerable portion of that time and effort has resulted from the Parrys' misguided attempt to invoke the Charter in these proceedings.

Faulkner C.J.T.C.