In the Provincial Court of Alberta

Citation: R v Slowinski, 2021 ABPC 160

Date: 20210521
Docket: A71467126R
A71467130R
Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Kaileigh Anne Slowinski

Decision of His Worship Justice of the Peace A. Schlayer

[1] Miss Slowinski (hereinafter referred to as the Defendant) is charged with two separate offences under the City of Edmonton Bylaw 13145, the *Animal Licensing and Control Bylaw* (hereinafter referred to as the *Bylaw*). Those offences are contained in two separate violation tickets and are violations of: (1) ss. 13(1) *Bylaw* (failure to control and leash a dog); and (2) para 14(1)(c) *Bylaw* (dog attack causing injury). As both of these alleged offences arose out of the same incident, at the start of the trial an application was made to try both together - that is, pursuant to one trial. Noting that the Defendant agreed with this application and finding that it would be in the interests of justice to conduct only one trial I granted that application in accordance with *R v Clunas*, [1992] 1 SCR 595.

[2] To properly understand the legal issues involved in this case both ss. 13(1) *Bylaw* and s. 14 *Bylaw* (in full) are set out as follows:

> 13(1) The Owner or any other person having care or control of a Dog or Nuisance Dog shall, at all times when it is off the property of the Owner, have it:
>
> (a) under control; and
>
> (b) held on a leash not exceeding two metres in length.

14(1) The Owner or any other person having care or control of a Dog or Nuisance Dog shall ensure it does not:

(a) damage property;

(b) chase, attack or bite any person or animal; or

(c) chase, attack or bite any person or animal causing physical injury.

14(2) This section does not apply if the chase, attack, bite or damage is a direct result of the Dog or Nuisance Dog being provoked.

The Evidence

[3] The evidence in this case is not particularly complicated. The Crown called two witnesses, only one of which is relevant here; the Defendant testified and called one witness.

[4] The relevant Crown evidence is encompassed in the testimony of Joanne Snydmiller (Snydmiller). She stated that she and the Defendant were neighbours and that the Defendant had three aggressive dogs, including a German Shepard named Moose (hereinafter called Moose), the one involved in this incident. The backyards of their respective properties were separated by a three foot high chain link fence. Because of the aggressive nature of the dogs, Snydmiller would not mow her grass when the dogs were in the Defendant's backyard unless the Defendant or someone else was present to supervise the dogs. Snydmiller viewed the dogs as a threat to her; she was afraid of them. When she was in her backyard, the dogs were "always at the fence, snarling, barking aggressively. There was no control over these animals." Specifically with respect to Moose, he would cause some difficulties at the fence, "Snapping, snarling, feet on the fence, barking aggressively." Nevertheless none of the dogs had ever come onto Snydmiller's yard and Snydmiller had never complained about the dogs either to "Animal Control" or the actual owner of the property. The Defendant did not own the property; she was just a renter.

[5] Because the Defendant was present on June 29, 2019, Snydmiller made the decision to mow her lawn. At the point when she was mowing the grass near the fence line of their properties, with the Defendant being a couple of feet from that fence line, Moose charged, got his front paws on the fence, and barked in her face. Initially she reflexively put her arm up to protect herself (not extending it out and not placing it over the fence) and then put it back down onto her lawn mower. Moose then lunged at her and his head came over the fence. Initially he bit her black T-shirt and brassiere underneath but later, as she put her right arm up to defend herself, he bit that arm around the elbow. Snydmiller, with some assistance from the Defendant, was eventually able to get her arm free but not before approximately 30 seconds had elapsed. As a result of this incident Snydmiller suffered serious injuries. Her arm became infected and suffered nerve damage. Snydmiller had to be placed on intravenous antibiotics for eight days and as of the date of the trial, her arm was still not back to normal. It was disabled to a certain extent causing her difficulties such as hanging onto a steering wheel.

[6] The Defendant testified that on June 29, 2019 she and her boyfriend, Steven Wobben (Wobben), were in her backyard with her dogs and mowing her grass (or at least attempting to do so) at the same time that Snydmiller was mowing hers. Moose was not restrained; he had free run

of the backyard. The Defendant stated that Moose was irritated with Snydmiller's lawn mower. On one occasion she walked him away from the fence. At the point when Snydmiller was near the fence the Defendant described her as reaching over the fence on three occasions. The Defendant described this action in two different fashions. At one point she stated it was to try and calm down Moose; at another point as trying to greet or befriend it. On each of these three occasions Moose did not jump onto the fence and on each occasion the Defendant took Moose away from the fence but did not take him into her house, stating that her history with Moose was such that she had no indication that he would react in the way that he eventually did. After the third occasion Moose jumped onto the fence. His front feet were on the top of the fence and his hind feet on the ground on the Defendant's side of the fence. The Defendant pushed him down with the intention of taking him inside. However, before she could do that Moose circled around her, jumped up onto the fence, and bit Snydmiller. The Defendant immediately intervened to assist in getting Moose's jaws off of Snydmiller's arm. She was able to do that after approximately ten seconds.

[7] Prior to June 29, 2019 the Defendant stated that there had been no previous incidents involving Moose and Snydmiller, nor had Snydmiller ever complained to her about Moose. Moose had never previously bitten either a person or another animal.

[8] Wobben testified that on June 29, 2019 he and the Defendant went outside to mow the Defendant's grass after hearing Snydmiller mowing her grass and noting that it had stopped raining. At the time of the incident he was approximately 25-30 feet away from the fence. He noticed Moose barking on the fence (his front paws were on the top of the fence) on two occasions. Prior to the first occasion, and on the first occasion, he saw Snydmiller put her hand out (he was not sure whether it was over the fence or not) "almost to look like she was trying to befriend him, stop him, from barking." On the first occasion the Defendant pushed Moose down. Moose then circled around the Defendant and jumped on the fence for a second time, this time biting Snydmiller while she was pushing her lawn mower.

The Law

Nature of the Offences

[9] The offences under ss. 13(1) *Bylaw* and para 14(1)(c) *Bylaw* are strict liability offences as those types of offences are defined in the case of *R v Sault Ste. Marie (City)*, [1978] 2 SCR 1299 (*Sault Ste. Marie*). Neither the Crown nor the Defendant disputes this proposition. The application of the principled approach to categorizing offences as set out in *Sault Ste. Marie* the seminal case in this area, reveals that this is the case.

[10] A portion of the preamble to the *Bylaw* states:

> **Whereas**, pursuant to section 7(a) of the *Municipal Government Act*, a council may pass bylaws for municipal purposes respecting the safety, health and welfare of people and the protection of people and property; and
>
> **Whereas**, pursuant to section 7(h) of the *Municipal Government Act*, a council may pass bylaws for municipal purposes respecting wild and domestic animals and activities in relation to them

[11] Section 1 of the *Bylaw* sets out its guiding purpose as follows:

> The purpose of this bylaw is to establish a system of licensing and control with respect to animals within the City.

A review of the rest of the bylaw reveals that its subject matter is in compliance with both the preamble and the purpose set out in s. 1.

[12] Bearing in mind that purpose, and applying the principles set out in *Sault Ste. Marie* at para 1 and *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154 (*Wholesale Travel*) at para 25 with respect to what are public welfare offences, there can be no doubt that ss. 13(1) *Bylaw* and para 14(1)(c) *Bylaw* are both public welfare offences. Accordingly, there is a presumption that it does not require *mens rea* - *Sault Ste. Marie* at para 61.

[13] Next, there are no words like “willfully”, “knowingly”, “purposely”, or “with intention” in either ss. 13(1) *Bylaw* or para 14(1)(c) *Bylaw* that would mandate a *mens rea* – *Sault Ste. Marie* at para 61. In the result then, both offences are not *mens rea* offences.

[14] Finally, there is nothing in the legislation to indicate that either offence is an absolute liability offence. In fact the opposite is the case. The overall regulatory pattern, the subject matter, the importance of the penalty (ss. 37(1) *Bylaw* sets out the maximum penalty for an offence under the bylaw as a fine not exceeding $10,000 and to imprisonment for not more than six months for non-payment of a fine), and the lack of any precise language to that effect all point to the offences as not being offences of absolute liability – *Sault Ste. Marie* at paras 61 and 66.

[15] Hence there is no doubt that both of these offences are strict liability offences. This is very similar to the situation in *Sault Ste. Marie* at para 66:

> … Since s. 32(1) [of the Ontario *Water Resources Act*] creates a public welfare offence, without a clear indication that liability is absolute and without any words such as “knowingly” or willfully” expressly to import *mens rea*, application of the criteria which I have outlined above undoubtedly places the offences in the category of strict liability.

Strict Liability Offences in General Terms

[16] For strict liability offences the Crown need only prove the *actus reus* beyond a reasonable doubt. Once that is done it “... is presumptively relieved of having to prove anything further. Fault is presumed from the bringing about of the proscribed result, and the onus shifts to the defendant to establish reasonable care on the balance of probabilities.” - *Wholesale Travel* at para 109. That is normally referred to as the defence of due diligence. Due diligence is defined in *Sault Ste. Marie* at para 60. It is available "... if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event..." This defence must be proved by the defendant on the balance of probabilities. While the shift of onus to a defendant infringes s. 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*Charter*) that infringement is saved by s. 1 *Charter* - see *Wholesale Travel* and the subsequent case of *R v Ellis-Don*, [1992] 1 SCR 840.

[17] The Defendant has submitted that the case of *Swankhuizen v Tirmizi*, 2008 ABPC 157 offers some assistance to the concept of strict liability. In particular he refers to para 14 of that case. I do not find that case to be of any assistance. It is decided in the context of a civil matter and when the Court refers to "strict liability", it doing so in the civil context. As just noted, a strict liability offence is clearly and precisely defined in the quasi-criminal context. There is no need to resort to principles relevant in a civil context. Not only is that unnecessary but it also has the potential to create needless confusion.

[18] To phrase the matter of the *actus reus* in another fashion, a defendant need only raise a reasonable doubt about the *actus reus* to secure an acquittal.

[19] Accordingly, one of the most important aspects of any analysis of a strict liability offence is the consideration of the *actus reus*. That consideration involves: (1) how an analysis of the *actus reus* is addressed in the context of the due diligence defence; and (2) specifically, what is the *actus reus* of the particular offence in question - in this case s. 13(1) *Bylaw* and para 14(1)(c) *Bylaw*. Each of these matters will be dealt with in turn.

Actus Reus v The Defence of Due Diligence

[20] As mentioned, for a strict liability offence there are two separate and distinct onuses - the onus on the Crown to prove the *actus reus* beyond a reasonable doubt and the onus on the defendant to prove the defence of due diligence on the balance of probabilities. Normally it makes no sense to consider the onus on the defendant until it has been determined that the Crown has proved the *actus reus* beyond a reasonable doubt. Thus it is extremely important to keep these two onuses separate and not let them blend into each other.

[21] I have performed an extensive analysis of the interaction of the *actus reus* of a strict liability offence with the defence of due diligence in the case of *R v Majstruk,* (13 June, 2012), Edmonton A60780941Z (ABPC). There is no need to repeat that here. Suffice it to say that before there is a shifting of the persuasive onus onto the defendant the Court must conclude that, on the basis of all of the evidence, the Crown has proved the *actus reus* of the offence beyond a reasonable doubt.

[22] Like any other case the *actus reus* must be assessed in accordance with the principles in *R v W(D)*, [1991], 1 SCR 742 (*R v W(D)*). That that is so is supported by the cases of *R v Novelo*, 2009 ONCJ 346 at paras 13 and 14; and *R v Woldenga*, 2009 ONCJ 38 at paras 15and 16. See also *R v Winter*, 2006 CanLII 36586 (NL PC) at para 15, and *R v Lamb*, 2007 CanLII 24166 (NL PC) at para 23.

[23] Accordingly I instruct myself in accordance with those principles. Specifically, I instruct myself in accordance with the law set out at para 11 of *R v W(D)*:

> Ideally, appropriate instructions on the issue of credibility should be given not only during the main charge, but on any recharge. A trial Judge might well instruct the jury on the question of credibility along these lines:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.

> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

Actus Reus of the Offences

[24] The *actus reus* of an offence includes all of the elements of the offence which go to the *actus reus* component. For the offences before the Court, like for all offences, the *actus reus* includes proof of the date of the offence, the relevant jurisdiction, and the identity of the Defendant as the person who committed the offence. None of these are in issue in this case for either of the offences.

[25] For the particular offence of s. 13(1) *Bylaw* the *actus reus* also includes: (1) proof of ownership or care or control; (2) of "a Dog"; (3) not having "it under control and held on a leash not exceeding two metres in length"; and (4) "it is off the property of the Owner". Here the first three elements are not in dispute. It is only the last element, "off the property", that is contested.

[26] With respect to the offence under para 14(1)(c) *Bylaw* the *actus reus* also includes: (1) proof of ownership or care or control; (2) of "a Dog"; (3) not ensuring "it does not chase, attack or bite any person or animal"; and (4) thereby "causing physical injury". None of these elements is contested in this case. The only issue with respect to this offence is whether ss. 14(2) *Bylaw* (i.e. provocation) is in play and if so, whether the onus is upon the Defendant to prove provocation on the balance of probabilities or on the Crown to disprove provocation beyond a reasonable doubt. A part of that issue is the determination of whether lack of provocation is an element of the offence, the onus of which to prove beyond a reasonable doubt is on the Crown or whether provocation is an "exemption, proviso, excuse, qualification or the like".

Provocation - ss. 14(2) Bylaw

[27] The analysis of ss. 14(2) consists of two different parts: (1) what kind of acts constitute provocation; and (2) upon whom is the onus fixed.

[28] Both of these parts deal with the interpretation of the subsection. In general terms how a particular piece of legislation is to be interpreted has been spelled out in the case of *Rizzo & Rizzo Shoes Ltd., (Re)*, [1998] 1 SCR 27 (*Rizzo*) where, at para 21, the Court states:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their

> grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

This principle has subsequently been followed many times - see for example *R v Gladue*, [1999] 1 SCR.688 at para 25, *Bell ExpressVu Ltd Partnership v Rex*, [2002] 2 SCR 559, 2002 SCC 42 at para 26 (*Bell Express Vu*), and *R v Jarvis*, [2002] 3 SCR 757, 2002 SCC 73 at para 77. It will be applied hereinafter along with other relevant principles of statutory construction where necessary and appropriate.

i) Provocation

[29] Starting then with the first part of the analysis, that is concerned with the meaning of the word "provoke". Unfortunately, the *Bylaw* itself does not provide a definition. There is no doubt that provocation has been extensively examined and analyzed in the criminal context, particularly with respect to the defence of provocation, s. 232 *CC*. The Defendant herself has provided a definition from *Black's Law Dictionary*, Third Pocket Edition, Bryan A. Garner Editor in Chief, St. Paul, Minnesota, U.S.A: Thomson/West, 2006. From the context that definition is clearly referencing the criminal context. That however, is of only limited, assistance here. The contrast between the two situations (one deals with provocation of a human being; the other with an animal) is so stark that no analogies can be drawn. Albeit in the context of sentencing, the Court in *R v Hardy*, 2007 ABQB 747 at para 16, states: "There was also argument that to declare the dog to be vicious is to put it in jail, to sentence it to a life of confinement. In my view, these phrases are best left to assessing sentencing of humans. An anthropomorphic approach to interpreting animal control bylaws is not helpful, and detracts from the paramount need to protect the public." The same applies here.

[30] Consequently, resort to reputable dictionaries (an entirely appropriate resource when interpreting legislation) and case authority is necessary to decipher the meaning of "provoke". Dictionary definitions will be examined first.

[31] The *Webster's Third New International Dictionary*, 2002, Merriam-Webster Inc., Publishers, Springfield, Massachusetts, U.S.A. provides the following relevant definitions of "provoke":

> 1 b): to incite to anger; and
> 3 b): to stir up on purpose: bring about deliberately

Then in the section on "Syn" it states:

> EXCITE, STIMULATE, PIQUE, QUICKEN: PROVOKE may center attention on the fact of rousing to action or calling forth a response; often it implies little about cause, manner, or result, but is often used in connection with angry or vexed reactions.

[32] A very similar definition of "provoke" is found in a more recent online version of this source. In *Merriam-Webster.com*. 2011. https://www.merriam-webster.com (8 May 2011) the relevant definition of "provoke"is:

> 1 a to stir up purposely; and
> 2 a to incite to anger

[33] Finally, in *The Oxford English Dictionary*, Second Edition (Clarendon Press, Oxford, 1989) "provoke" is defined as:

> II. 4. To incite or urge (a person or animal) *to* some act or *to do* something: to stimulate to action; to excite, rouse, stir up, spur on.
> 4. b. To stir up, agitate.
> 5. To incite to anger (a person or animal): to enrage, vex, irritate, exasperate.
> 6. To excite, stir up, arouse (feeling, action, etc.); to give rise to, call forth.
> 6. b. *transf.* To excite, give rise to, induce, bring about (a physical action, condition, etc.).

[34] All of these definitions are similar and will be very useful and of assistance later - in the analysis of whether the facts of this case evidence provocation.

[35] There is limited case authority on what amounts to provocation. None of the cases discovered provide a general definition of "provocation". The case of *Whitehorse (City) v Parry*, 2007 YKTC 31 defines not what provocation is but what it is not. At paras 19-21 it states that intervening in a dog fight cannot amount to provocation. At first blush, it is arguable that an inference from a second case, *Burnaby (City) Animal Control Officer v Nagra*, 2010 BCPC 34 (*Nagra*) at paras 3 and 4, can be drawn that barking also does not amount to provocation. Nevertheless, a closer examination of that case reveals that such an inference may be suspect. Unlike the legislation in the former case, where "without provocation" was included in the definition of a "dangerous dog", in the latter case it was not (see s. 49 of the *Community Charter*, S.B.C. 2003, c. 26). Thus, provocation was not specifically dealt with in that case and was not a particularly relevant issue.

[36] A third case, *Bolen v Regina (City)*, 2004 SKQB 263, again appears to describe what is not provocation. At para 8 it states: The suggestion that a tethered cat is almost a provocation to a dog must be almost rejected." The same applies to the case of *New Westminster (City) Animal Control Officer v Letendre*, 2010 BCPC 38 (*Letendre*). There, albeit, again, in the context of the same legislation in issue in *Nagra*, the Court essentially concludes that "friendly, submissive and consummately non- threatening behaviours" (para 44) like extending a hand to allow an unfamiliar dog to sniff it before moving nearer (para 14) does not amount to provocation. For comprehensive details on this point, see, in full, paras 14, 15, 23, 44, 54, and 61.

[37] One case was found that does describe a particular type of conduct that can amount to provocation. In *R v Rasuli*, 2017 BCPC 310 at paras 54-61 the Court found that the action of one dog jumping at a second dog amounts to provocation of the second dog.

[38] Another case, *R v Howdek*, 2008 SKQB 434, in the context of whether a dog was dangerous and where part of the definition of "dangerous" required "without provocation", does provide a little more guidance. It concludes that in deciding whether a dog is dangerous the normal way that a dog acts must be taken into account. Specifically, at para 24 it states:

> In determining whether a dog is dangerous, the assessment must be in the context of a dog acting in the normal way of canines.

There is no reason why that too cannot be taken into account in determining what provocation is. In fact, that is made somewhat explicit in a very recent case from this Court, *R v Shirjang*, 2020

ABPC 76. In the context of deciding whether provocation existed in that case the Court, at para 30 states: “I do not have evidence that Tookie did anything more then [sic] any other dog would have done when excitingly greeting her owner.”

[39] That case also wrestles with the definition of provocation. It discusses a number of the cases just cited but it too does not provide a general definition. By stating: “...I am not prepared to conclude that Tookie's presence on the date in question, as well as the continuous barking that Tookie exhibited from the moment she left her home and ran down the stairs in excitement towards her owner and Mr. Shirjang's property, rise to the level necessary for provocation. If Tookie had growled, aggressively barked, or bit Axel or Mr. Shirjang first, this would most certainly constitute provocation.” it is simply another example of what specific facts can or cannot amount to provocation. Again, helpful, but only as far as it goes.

[40] In the end case authority is of some, but limited, assistance. Whether there was or was not provocation here will depend on the individual circumstances as found in this case.

ii) Onus

[41] Turning now to second part, the issue of onus, it is to be first observed that no argument has been put forth based on any of the provisions of the *Charter* – specifically ss. 11(d) thereof, the presumption of innocence. And second, this part involves an analysis of two distinct matters. First is whether provocation is an “exemption, proviso, excuse, qualification or the like” and second if so, upon whom is the onus placed. The former is factually and statutorily driven and thus best left to be addressed below in the section on whether the Crown has proved the *actus reus* of the offence. The latter is of a very general nature and will be addressed here.

[42] To begin this analysis it is to be observed that the interpretation of ss. 14(2) *Bylaw* would have been far less complicated if ss. 794(2) *Criminal Code*, R.S.C. 1985, c. C-46 (*Criminal Code* or *CC*) was still in effect. That subsection read:

> 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, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

[43] The case of *R v Goleski*, 2014 BCCA 80 (*Goleski*) at paras 73 – 81, affirmed, [2015] 1 SCR 399, makes it clear that this section placed the onus on the defendant to prove on the balance of probabilities any “exception, exemption, proviso, excuse or qualification” – see paras 73-81. Thus, the only issue would have been whether ss. 14(2) *Bylaw* was an “exception, exemption, proviso, excuse or qualification”.

[44] However, ss. 94(2) *CC* was repealed by s. 68 of *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, S.C. 2018, c. 29 (formerly Bill C-51 and hereinafter referred to as Bill C-51). That section simply read: “Subsection 794(2) of the Act is repealed.” It came into effect on December 13, 2018, well before the date of the offences in this case. The apparent simplicity of this amendment belies the extremely difficult nature of any interpretations associated therewith. Those will become readily apparent immediately below.

[45] Bill C-51 begins with, in part, the following summary:

> This enactment amends the *Criminal Code* to amend, remove or repeal passages and provisions that have been ruled unconstitutional or that **raise risks with regard to the *Canadian Charter of Rights and Freedoms***, as well as passages and provisions that are obsolete, redundant or that no longer have a place in criminal law. It also modifies certain provisions of the Code relating to sexual assault in order to clarify their application and to provide a procedure applicable to the admissibility and use of a complainant's record when in the possession of the accused.
>
> [Emphasis added.]

[46] Thereinafter not only is ss. 794(2) *CC* repealed but a number of other provisions that purported to place an onus on the accused are also amended. There are numerous examples of this. To name but a few, see for example:

1) s. 5 of Bill C-51 (removed the words "the proof of which lies on the person" from ss. 82(1) *CC*);
2) s. 9 of Bill C-51 (removed the words "the proof of which lies on him" (or "them" or "the person") from subsections 145(1) to (5.1) *CC*);
3) s. 14 of Bill C-51 (removed the words "the proof of which lies on him" from s. 177 *CC*); and
4) 4) s. 35 of Bill C-51 (removed the words "the proof of which lies on that person" from ss. 349(1) *CC*).

[47] The concern with a provision that places a burden on a defendant, like the former ss. 794(2) *CC* did, is always whether it violates of ss. 11(d) *Charter*, the presumption of innocence. It matters not whether the burden is with respect to "an essential element, a collateral factor, an excuse, or a defence" – see *R v Whyte*, [1988] 2 SCR 3 (*Whyte*) at paras 26-37 and in particular para 34; and *R v Keegstra*, [1990] 3 SCR.697 at paras 146-147. Case authority has demonstrated that in the vast majority of situations a reverse onus will be found to be a violation of s. 11(d) *Charter*. The real focus is on whether the reverse onus can be saved by s. 1 *Charter*. And in the context of criminal law, and recent case authority, that is in serious doubt. As stated at para 97 in *R v Laba*, [1994] 3 SCR 965 during a s. 1 *Charter* analysis in the criminal context: "Imposing a legal or persuasive burden on the accused in respect of an **offence characterized as a true criminal offence is a serious impairment of s. 11(*d*)**." [Emphasis added.]

[48] The constitutionality of s. 794 *CC* has been the subject of recent commentary in the legal literature – see for example Sankoff, Peter, Sarah Denholm and Brandyn Rodgerson. "*An Unfair and Costly Burden: Assessing the Impact of Section 794(2) of the Criminal Code on the Criminal Justice System*" (2017), 42 *Queen's L.J.* 1. The whole tenor of this article is that ss. 794(2) *CC* was likely unconstitutional in the criminal law context as being a violation of s. 11(d) *Charter* and not capable of being saved by s. 1 *Charter*. Its concluding statement is: "In short, section 794(2) is a relic of a bygone era and most likely unconstitutional. It should be repealed or struck down as soon as possible". Further, as noted in the article, the constitutionality issue had been brought into sharp focus following the decision in the case of *Goleski*. Prior to that case there was conflicting case authority concerning the interpretation of ss. 794(2) *CC*. Rather than placing

a reverse onus on the accused other case authority concluded that it only placed an evidentiary burden on an accused. The leading authority espousing this conclusion was *R v Lewko*, 2002 SKCA 121 (*Lewko*). It is significant that if that latter interpretation was correct, constitutional issues would have largely been avoided. In a case predating *Goleski*, the Alberta case of *R v Plante*, 2013 ABQB 222 (*Plante*), adopted the reasoning of *Lewko* with one of the reasons for doing so being that to do otherwise would require that it place an unconstitutional meaning on s. 794(2) *CC* (paras 62-78). Specifically, at para 74 it states: "I doubt that an interpretation of s. 254(2) [in the context of ss. 794(2) *CC*] which offends the presumption of innocence could withstand *Charter* scrutiny."

[49] While I am unaware of any cases that have outright struck down ss. 794(2) *CC* on this basis in the criminal law context, that very issue has been referred to many times. No doubt older authority can be found that upholds s. 794(2) *CC* in the criminal context– see for example *R v Peck*, 1994 CarswellNS 1, (1994), 128 N.S.R. (2d) 206 (*Peck*) where the Court concluded that s. 794(2) *CC* violated ss. 11(d) *Charter* but was saved by s. 1 *Charter*. Nevertheless, I can find no cases that have subsequently followed this case on this constitutional issue nor am I aware of more recent such authority (at least authority that analyzes this in any kind of detailed fashion), that takes into account how the interpretation of the *Charter* has evolved in general, and how it has evolved in the context of a reverse onus provision in particular, since that case. In fact *Peck* was questioned in the substantially later Alberta case of *Plante* at paras 70-76 on the basis that the conclusion that s. 794(2) *CC* created a reverse onus was suspect to a *Charter* challenge (see paras 70-76). I also note that *Goleski* at para 30, itself was very careful to acknowledge that the case before it did not involve any *Charter* considerations (see para 30). As will become clear later, many cases have also addressed s. 794(2) *CC* in the context of regulatory offences.

[50] A preamble of an enactment (like the summary of Bill C-51 set out above) assists in the interpretation of the enactment itself – see s. 13 *Interpretation Act*, R.S.C. 1985, c. I-21 (hereinafter referred to as the *Interpretation Act (federal)*). As an example of its application, see *R v D(C)*, [2005] 3 SCR 668, at paras 33-38. From the combination of the summary of Bill C-51, the repeal in that Bill of many other provisions that purported to place an onus on the accused at the same time as the repeal of ss. 794(2) *CC*, the case authority on reverse onus provisions in general and s. 794(2) *CC* in particular, and the legal literature, arguably an inference can be drawn that when Parliament repealed ss. 794(2) *CC*, they had very real concerns about whether ss. 794(2) *CC* would withstand *Charter* scrutiny in the criminal law context. That may have been a significant factor, and may have formed a substantial basis, for its repeal. While some arguments may be advanced to the contrary, one cannot be faulted for being somewhat skeptical of their success. In making this comment I would be remiss in not noting that there is, in fact, Provincial Court authority in this jurisdiction that concludes that the onus still remains on an accused notwithstanding the repeal of s. 794(2) *CC* - see *R v McKinnon*, 2020 ABPC 86 at paras 29-32 (subsequently followed in *R v Daytec*, 2021 ABPC 48). Fortunately, it is not absolutely essential to decide that issue in this case. But neither can it be completed ignored.

[51] Subsection 794(2) *CC* was in the *Criminal Code*; it was not specifically contained in any Alberta legislation. Nevertheless it had been incorporated into Alberta law by virtue of s. 3 of the *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34 (*POPA*). That section reads:

> Except to the extent that they are inconsistent with this Act and subject to the regulations, all provisions of the *Criminal Code* (Canada), including the

> provisions in Part XV respecting search warrants, that are applicable in any manner to summary convictions and related proceedings apply in respect of every matter to which this Act applies.

Subsection 794(2) *CC* applied to summary conviction proceedings in the *Criminal Code*.

[52] It is worthwhile to note that ss. 794(2) *CC* also applied to all other federal legislation. Like s. 3 *POPA*, ss. 34(2) of the *Interpretation Act (federal)* applied the summary conviction proceedings in the *Criminal Code* to all federal legislation except where otherwise stated.

[53] Thus, the repeal of s. 794(2) *CC* has created difficult interpretation issues with respect to at least three different areas:

1) federal legislation dealing with the criminal law of which the *Criminal Code* is but one example;

2) federal legislation dealing with summary conviction offences concerning public welfare type offences; and

3) provincial legislation, like Alberta's legislation, that incorporated it into provincial law.

[54] For reasons previously mentioned (see para 50 above), it can be argued that any analysis of the effect of the repeal of ss. 794(2) *CC* is probably simplest with respect to federal matters in the criminal law area, like the *Criminal Code*. Likely the most difficult interpretation issue involves federal legislation dealing with public welfare offences in the summary conviction context. Fortunately, for the purposes here, it is not essential to directly deal with either of these two matters. The precise issue here is the effect of the repeal in the Alberta context.

[55] To analyze the effect of the repeal of s. 794(2) *CC* on Alberta law it is essential to be mindful of three significant matters. First, Alberta had no direct involvement with the repeal, that is, no legislation was passed by the Alberta legislature to give effect to this repeal. Second, the context in which the repeal occurred is crucial, that context being a repeal of a matter involving the criminal law, specifically a provision of the *Criminal Code*. Pursuant to s. 91(27) of the *Constitution Act, 1867 (U.K.)*, U.K., 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5 only Parliament has any jurisdiction over criminal law; a province does not. As noted in *Sault Ste. Marie* at para 63 valid provincial legislation cannot create "an offence which is criminal in the true sense." And finally, when applying the previously discussed approach to the interpretation of statutes, it is the words of the relevant Alberta legislation that are to be read in their context with the scheme of Alberta legislation generally, the object of the relevant Alberta legislation, and the intention of the Alberta legislature. It is to be stressed that it is not the object of the federal legislation or the intent of the Parliament of Canada that are directly relevant. They are only relevant in an indirect sense.

[56] It is in this setting that the words of *Bell ExpressVu* at para 12, with the necessary changes, take on particular meaning and emphasis:

> ...where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of

> Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069 (S.C.C.), at p. 1079; *Pointe-Claire (Ville) c. S.E.P.B., Local 57*, [1997] 1 S.C.R. 1015 (S.C.C.), at para. 61, *per* Lamer C.J.)

[57] And as well, as already alluded to and as will become clearer, it is also in this setting that there is ambiguity as to what is the effect of the repeal of s. 794(2) *CC* on Alberta law. Does the repeal mean that "an exception, exemption, proviso, excuse or qualification" now has to be disproved by the Crown beyond a reasonable doubt or does the onus remain, as it was before the repeal, on the Defendant to prove "an exception, exemption, proviso, excuse or qualification" on the balance of probabilities? That is, the repeal is "reasonably capable of more than one meaning" and "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning (para 29 and 30 of *Bell ExpressVu* respectively). Accordingly, this is a different situation from that that existed in *R v McIntosh,* [1995] 1 SCR 686 at para 19 and 30-31 where the Court found that no ambiguity existed and thus resort could not be made to an argument with respect to absurdity (para 36). As here there is ambiguity, it is entirely appropriate "to consider which of the alternative interpretations that are available best accords with Parliament's intention" and "[a]bsurdity is a factor to consider" - *R v Hibbert*, [1995] 2 SCR 973 at paras 31 and 32 respectively. Additionally, other relevant principles of statutory interpretation are available to aid in determining which interpretation is the correct one - *Bell ExpressVu* at paras 28-29 and *R v S (O S),* 2002 ABCA 214 at para 19.

[58] To continue with, and to aid in, this analysis two different sources of authority have to be considered, the first a relevant principle of statutory construction and the second the effect of any relevant Alberta legislation.

[59] With respect to the first, one of the principles of statutory interpretation is that legislation overriding the common law must be strictly construed. An older Supreme Court of Canada case, *Controni v Quebec (Police Commission),* (1977), [1978] 1 SCR 1048 at para 16 describes this principle in very strict terms as follows:

> A rule of common law is not repealed by a statute that does not mention it (*Alliance des professeurs catholiques de Montréal v. Labour Relations Board* [citation omitted]).

[60] However, the strictness of this principle was relaxed in the later case of *R v G(B),* [1999] 2 SCR 475. Bastarache J. states at paras 40 and 43:

> First, the principle that legislation that overrides the common law must be strictly interpreted prevailed for a long time in Canada. **Under this principle, it would have to be concluded that s. 672.21 does not in any way proscribe the use of the common law rules of evidence since it does not expressly provide for this.** The application of this rule is not, however, conclusive.

.....

> In my view, that question has already been settled in *Whittle* supra; the issue here is simply to determine the scope of that decision. Also, contrary to the appellant's contention, the actual wording of s. 672.21 **is not inconsistent with the application of the confessions rule** [a common law rule]**. In fact, nothing in the wording indicates that Parliament was trying to abolish, it**, especially if the section is read with the above-mentioned principles of interpretation [one of which is set out the passage immediately above] in mind.
>
> [Emphasis added.]

[61] *Goleski,* at para 77 Frankel, J.A. describes this principle as follows:

> Also militating against an interpretation of s. 794(2) that would result in a significant change in the law is the presumption that legislation respects the common law and should not be interpreted as having changed established legal principles unless such an interpretation is clearly required. This principle is stated in *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada, 2008) at 431:
>
> > ***Presumption against changing the common law***. Although legislation is paramount, it is presumed that legislatures respect the common law. It is also presumed that legislatures do not intend to interfere with common law rights, to oust the jurisdiction of common law courts, or generally to change the policy of the common law. As explained in *Halsbury* [36 Hals., 3rd ed., § 625], in a formulation adopted by many Canadian courts:
> >
> > Except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law.

[62] Why this principle of statutory interpretation is so important is that ss. 794(2) *CC* was a codification of the common law. An exhaustive history of ss. 794(2) *CC* is set out at paras 31-59 of *Goleski*. What becomes very clear from that analysis is that ss. 794(2) *CC* was exactly that, a codification of the common law – *Goleski* at paras 73-78. An earlier case, *R v Lee's Poultry Ltd.*, 1985 CanLII 166 (ON CA) (*Lee's Poultry*) at para 6-8, also reached the same conclusion. What that common law encompassed was essentially settled by the English case of *R v Edwards,* (1975), [1974] 2 All E.R. 1085 (Eng. Q.B.) (*Edwards*). Although the following cited passages from that case are lengthy, those passages are necessary and appropriate to fully understand the common law and its true flavour. At p. 1095 the Court states:

> In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications

> or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, **subject to provisos, exemptions and the like, then the prosecution can rely on the exception.**
>
> In our judgment its application does not depend on either the fact, or the presumption, that the defendant has peculiar knowledge enabling him to prove the positive of any negative averment. As Wigmore pointed out in his great treatise on evidence this concept of peculiar knowledge furnishes no working rule. If it did, defendants would have to prove lack of intent. What does provide a working rule is what the common law evolved from a rule of pleading. We have striven to identify it in this judgment. Like nearly all rules it could be applied oppressively; but the courts have ample powers to curb and discourage oppressive prosecutors and do not hesitate to use them.
>
> Two consequences follow from the view we have taken as to the evolution and nature of this exception. First, as it comes into operation on an enactment being construed in a particular way, there is no need for the prosecution to prove a prima facie case of **lack of excuse, qualification or the like**; and secondly, what shifts is the onus: it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden.
>
> [Emphasis added.]

[63] In its written submissions the Crown has cited two other English cases, *R v Turner*, (1816), 5 M & S 206 and *Williams v Russell*, (1933), 149 LT 190 for this common law principle. But in light of the difficulties in how the former case was being interpreted (*Edwards* at 1090-1092) it is more correct to rely on *Edwards*. It was that case that was referred to in *Lee's Poultry* at para 7 and, with some deletions, the same passages from that case, as set out above, were cited. See also *R v Williams*, 2008 ONCA 173 (*Williams)* at paras 25-26.

[64] This common law is of a longstanding nature dating back centuries. Obviously for not as long a period so too is the incorporation of this common law into Alberta through the operation of s. 794(2) *CC*. Without delving into the total history of this incorporation, it is to be observed that it predates the *Provincial Offences Procedures Act* which came into effect on November 1, 1989. Prior to that it was incorporated by virtue of *The Summary Convictions Act*, R.S.A. 1970, c. 355 – see s. 5.

[65] Turning now to the second authority, relevant Alberta statutes, that involves an examination of both s. 3 *POPA* and the *Interpretation Act*, R.S.A. 2000, c. I-8 (*Interpretation Act* or *IA*).

[66] At first blush the words "Except to the extent that they are inconsistent with this Act and subject to the regulations" in s. 3 *POPA* appear to be dispositive. Upon the removal of ss. 794(2) *CC* a literal reading of the federal legislation would result in no provision for an "exception, exemption, proviso, excuse or qualification". The logical conclusion for Alberta would then be that the common law applies.

[67] But this could be said to be too simplistic. To simply adopt and accept this literal interpretation would be to ignore how the legislation might be interpreted in the federal context. As of yet, I not aware of any definitive authority as to the effect of the repeal of ss. 794(2) *CC* on criminal legislation like the *Criminal Code*. But, as per the previous discussion, there is a distinct possibility that in that context it could be concluded that the repeal was sufficiently clear to alter the common law with the result that any "exception, exemption, proviso, excuse or qualification" will now have to be disproved by the Crown.

[68] A more helpful statutory provision is contained in the *Interpretation Act*. Because one is dealing with an interpretation of Alberta law, it is this statute that is material and not the federal legislation, *Interpretation Act (federal)*, even though the amendment involves federal legislation. As already noted, provisions in the *Criminal Code* relating to summary conviction proceedings have been incorporated into Alberta law.

[69] The provision of particular importance in the *Interpretation Act* is s. 33 *IA*. That section reads:

> If an enactment provides that another enactment of Alberta, Canada or another province or territory applies, it applies with the necessary changes and so far as it is applicable.

[70] The words "it applies with the necessary changes and so far as it is applicable" are the most relevant and important for our purposes. Although I could find no cases that have judicially considered this provision, a plain reading of it indicates that the legislation that has been made applicable to Alberta may have one interpretation in the originating jurisdiction but a different one in Alberta. To put that in terms relevant to this case it means that the effect of the repeal of ss. 794(2) *CC* on federal criminal law may be entirely different than the effect on Alberta law. And is the effect on Alberta legislation that must be determined.

[71] It is trite to say that context is everything but there can be no doubt that that is the case here. Alberta law does not and cannot involve criminal law. As a rule, Alberta laws involve public welfare type of offences. The case of *Sault Ste. Marie* defines these types of offences:

> 1) as offences that "... relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like..." at para 1;
>
> 2) as offences to maintain "... high standards of public health and safety..." at para 24;
>
> 3) as offences that "... involve a shift of emphasis from the protection of individual interests to the protection of public and social interests ..." at para 28; and
>
> 4) as offences that "... are not criminal in any real sense but are prohibited in the public interest ..." at para 1.

What is extremely important in our context is that: "Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences [public welfare offences] are in substance of a civil nature and might well be regarded as a branch of administrative law **to which traditional principles of criminal law have but limited application.**" at para 1.

[Emphasis added.] The distinction between a "... true criminal offence and the public welfare offence **is one of prime importance...**" [Emphasis added.] *Sault Ste. Marie* at para 22.

[72] The subsequent case of *Wholesale Travel* essentially concurs with many of these comments and makes similar types of statements. For example, in that case, in a minority opinion (the opinion of Cory J. concurred in by L'Heureux-Dube, J.) it is noted that public welfare offences are:

1) offences that prohibit conduct in the public interest (para 17);

2) offences that are "designed to protect those who are unable to protect themselves." (para 18);

3) offences "created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and general welfare of the pubic" (para 20); and

4) offences that are the primary mechanism employed to implement public policy objectives and that "regulation is absolutely essential for our protection and well-being as individuals, and for the effective functioning of society." (paras 29-33)

[73] The minority opinion then goes on to make it clear that there is a distinct difference between true crimes and public welfare offences (para 28). Although lengthy, the following passages provide the basis for this clear distinction (paras 24-27):

> It has always been thought that there is a rational basis for distinguishing between crimes and regulatory offences. Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.
>
> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.
>
> It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner

> as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.

[74] It is the distinction between true criminal offences and public welfare offences that is key to this decision. *Charter* considerations always have to be analyzed contextually - see *Wholesale Travel*, per Cory J. at paras 43-51. Specifically, at para 48 it is stated "...constitutional standards developed in the criminal context cannot be applied automatically to regulatory offences." The difference between criminal offences and regulatory offences requires that they be treated different for the purposes of *Charter* review (*Wholesale Travel*, Cory J. at para 51). The justification for the difference in treatment is twofold – a licensing justification and a vulnerability justification. Those justifications are exhaustively discussed in *Wholesale Travel* by Cory J. at paras 52-65 and 66-71 respectively. While those justifications are important and always to be kept in mind, for our purposes it is not necessary to examine them in any great detail here.

[75] It was mainly the distinction between criminal offences and public welfare offences that lead the Court in *Wholesale Travel* to uphold the onus placed on a defendant to prove due diligence. Although a minority of the Court (Cory J. concurred in by L'Heureux-Dube, J.) in *Wholesale Travel* at para 110 concluded that the onus placed on a defendant to prove due diligence was not a violation of s. 11(d) *Charter*, the rest of the Court found otherwise. That reverse onus was only saved as three other members of the Court (in a decision authored by Iacobucci J. and concurred in by Gonthier and Stevenson JJ.) found that the reverse onus could be saved by s. 1 *Charter*. The minority opinion (Cory J. concurred in by L'Heureux-Dube, J.) also found that s. 1 *Charter* would apply if they were wrong with respect to their finding of no violation at para 121.

[76] Arguably then for both types of offences a reverse onus provision, possibility with some limited exceptions (although not a perfect illustration, see, for example, *R v Schwartz*, [1988] 2 SCR 443 at paras 86-87) (*Schwartz*), will in all probability be found to be a violation of s. 11(d) *Charter*. It follows then that there is a distinct possibility that s. 794(2) *CC* would also have been found to be a violation of s. 11(d) *Charter*. Nevertheless, it is indisputable that the finding whether such a violation could be justified under s. 1 *Charter* could be different in the two different contexts – i.e. not being justified under the criminal law and being justified for public welfare offences. That would be largely for the same reasons (the distinction between criminal offences and public welfare offences) that the reverse onus of proving due diligence was saved by s. 1 *Charter*.

[77] In fact a number of cases have already concluded that s. 794(2) *CC*, at least in the context of public welfare types of offences, is not constitutionally invalid. In *Lee's Poultry* while the Court was not dealing with s. 794(2) *CC* directly, it was dealing with it indirectly. The provision involved was a provincial provision, a provision that was equivalent to s. 794(2) *CC*. The Court found that the provincial provision did not violate s. 11(d) *Charter* but if it did, it was saved by s. 1 *Charter*. The legislation in *R v G(T)*, 1998 NSCA 61 (*G(T)*) was very similar to the legislation in Alberta. Like in Alberta the provincial legislation in Nova Scotia incorporated s. 794(2) *CC* into provincial law. It was in that context (a provincial offence) that the constitutionality of s. 794(2) *CC* became an issue. The Court at paras 19-36 made an assumption that it violated s. 11(d) *Charter* but that it was saved by s. 1 *Charter*. During its decision the Court at paras 36-47 cited a number of cases that also came to the same conclusion, albeit sometimes in a different

context. *R v Daniels*, 1990 CarswellBC 659, (1990), 60 C.C.C. (3d) 392 (B.C.C.A.) (*Daniels*) was decided in the context of federal legislation to which a previous equivalent of the now former s. 794(2 *CC*) was applicable. It too found that the previous equivalent of s. 794(2) *CC* could be upheld on the basis of s. 1 *Charter*.

[78] It is also illustrative to note that even in the criminal context, provided the right circumstances are present, a reverse onus provision might also be saved by s. 1 *Charter*. *Schwartz* at paras 86-94 dealt with then ss. 106.7(1) *CC* (the equivalent section now being 117.11 *CC*), a provision that placed the onus on an accused to prove that he had the proper certificates or permits for a firearm. The context of that case was extremely important. The provision in issue was contained in a comprehensive licencing and regulatory scheme for firearms. This is somewhat akin to a public welfare type of offence where licencing provisions are the norm. Although the majority found that this provision did not violate s. 11(d) *Charter*, it went further and concluded that if it did, it was saved by s. 1 *Charter*. See also *Whyte*.

[79] In coming to any conclusion on the effect of the repeal of s. 794(2) *CC* on Alberta legislation all of the above must be taken into account. To summarize somewhat, that includes:

1) Alberta had no direct involvement with the repeal of s. 794(2) *CC*;

2) the application of the principled approach to the interpretation of legislation set out in *Rizzo* specifically bearing in mind that it is Alberta legislation that must be interpreted and the relevant intention is the intention of the Alberta legislature;

3) the principle of statutory construction that legislation overriding the common law must be strictly construed and it is presumed that legislatures do not intend to interfere with common law rights;

4) **of particular importance**, the context in which the repeal applies in Alberta, that context being with respect to public welfare offences and not offences of a truly criminal nature; and

5) a number of Courts of Appeal across Canada have concluded that ss. 794(2) *CC* is constitutional in the public welfare offence context.

[80] To elaborate on this latter point, one must be mindful that there is a substantial likelihood that a reverse onus provision in the context of public welfare offences will be saved by s. 1 but the same cannot be said in the criminal law context. After all, that is the very reason (the regulatory context) that the defence of due diligence (a reverse onus defence) was upheld by the Supreme Court of Canada in *Wholesale Travel*. An analysis of all of these factors as a whole, not individually, leads inexorably to the conclusion that the repeal of s. 794(2) *CC,* at least in Alberta, did not repeal the common law upon which it was based. As already noted, after its repeal a plain reading of s. 3 *POPA*, in combination with all of the provisions of the *Criminal Code* applicable to summary convictions, discloses that, in Alberta, there is no longer a statutory provision for an “exception, exemption, proviso, excuse or qualification”. As the common law has not been repealed it must prevail; it comes into full force and effect. It is the common law spelled out generally in *Edwards*, with particular emphasis on the passage cited at para 62 above, that now applies.

[81] In the end, although in a different context, the comments made by Frankel J.A. in *Goleski* are apropos here by analogy and with the necessary changes. At para 75 he states:

> I accept that s. 794(2) can be seen as ambiguous, in that it begins by placing the positive burden on an accused to prove an exception, etc., and then appears to place a negative burden on the prosecution to disprove that very thing. **However, I am of the view that when examined through a historical lens it is evident that Parliament did not intend to effect a sea change to a provision grounded in the common law and which had been in force for close to 85 years.**
>
> [Emphasis added.]

[82] There are two final matters that must be addressed. First there can be no doubt that the common law is also subject to *Charter* scrutiny. Whether this common law reverse onus will withstand such scrutiny is best left to when that issue is raised. For now all that will be said is that any examination will involve an analysis similar to that involved with the analysis of the due diligence defence for strict liability offences. And further, even if one might be able to conjure up a situation with respect to a public welfare offence where one would be forced to conclude that the reverse onus could not be saved by the application of s. 1 *Charter*, that does not necessarily mean that the whole concept of a common law reverse onus should be struck down. Although arguably not uncontroversial, that should turn on a case by case basis. Although in dissent on the main issues, see for example Dickson, CJC in *Schwartz* at para 74. See also G(T), at para 20, 29, and 49; and *R v H(P)*, 2000 CanLII 5063 (ON CA) *(H(P))* at paras 6 and 12.

[83] And second, a cautionary note. Although it does not appear to have been definitively decided, the common law reverse onus rule, in all likelihood, does not apply to defences ordinarily recognized by law such as intoxication, necessity, duress, provocation, self-defence etc. It applies only to specific statutory defences set out in the relevant statute. That flows from the nature of the common law rule itself, particularly the words: "Whenever the prosecution seeks to rely on this exception, **the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely on the exception.**" [Emphasis added.] Although not decisive, in the context of ss. 794(2) *CC*, the cases of *H(P)*, at paras 15-16, *Lewko* at para 18, and *Williams* at para 27-28 appear to lend some support to this proposition.

[84] The case of *R v Perka*, [1984] 2 SCR 232 is more explicit. There the common law defence of necessity and a provision of the since repealed *Narcotic Control Act*, R.S.C. 1970, c. N-1 that was essentially equivalent to s. 794(2) *CC* were in issue. Dickson J. states, at paras 60-61:

> The *Narcotic Control Act* provides for several statutory exceptions to its broad prohibitions against importation, sale, manufacture and possession. The offences created by the Act are generally subject to the proviso that the accused not have been acting under the authority of the Act or the regulations thereunder. See ss. 3(1) (possession), 5(1) (importation) and 6(1) (cultivation). Section 12, of the Act implements this scheme by providing for a set of regulations governing the issuance of licences for, *inter alia*, the importation, sale, manufacture or

> possession of narcotics. One who sells, imports, manufactures or possesses narcotics pursuant to such authority does not commit an offence.
>
> **It seems clear that it is to these statutory exceptions that s. 7(2) refers, and not to common law defences such as necessity**. One who wishes to plead the possession of a licence or other lawful authority in response to a charge of importation bears, under s. 7(2), the burden of persuading the trier of fact that such licence exists. One who pleads necessity bears no such burden. Section 7(2) does not place a persuasive burden as to the defence of necessity on the accused.
>
> [Emphasis added.]

Has the Crown Proved the Actus Reus of the Offences?

Subsection 13(1) Bylaw

[85] With respect to ss. 13(1) *Bylaw* the only issue raised by the Defendant with respect to the *actus reus* is whether the bite occurred wholly within the Defendant's yard or whether Moose reached across the fence to bite Snydmiller. If the former, the offence would not be proven as the offence has to occur "off the property of the Owner". If the latter, the only issue is whether reaching across the fence is sufficient to establish Moose was "off the property of the Owner".

[86] Clearly, on the evidence of Snydmiller Moose reached over the fence to bite her. The Defendant however, essentially argues that there should be a reasonable doubt on this point based upon the totality of the evidence presented by the Defendant. That is, there should be a reasonable doubt whether the bite occurred on Snydmiller's side of the fence or wholly on the Defendant's side.

[87] I do not find that any such interpretation can be placed on the defence evidence. At no time does either the Defendant or Wobben specifically state that the bite occurred on the Defendant's side of the fence. And even more importantly, I find as a fact that the clear inference from the evidence of both of them is that Moose reached over the fence to bite Snydmiller. The evidence of both the Defendant and Wobben must be examined as a whole but as examples, I cite, particularly, the following evidence:

A) The Defendant

> "He [Moose] immediately circled around me, jumped up and did bite her arm, as it was bent, **pushing the mower**." [Emphasis added.] – Trans. 31/37-38;
>
> "...before I could even grab him, he had circled around and jumped up and bit her, **as she was pushing**." [Emphasis added.] – Trans. 35/2-3; and
>
> At the time of the bite the Defendant stated that Moose's back legs were on the ground of her property but his front legs were either on the fence or under her arm – Trans. 35/9-20.

B) Wobben

> Wobben testified that, at the time of the bite, Moose had jumped on the fence as Snydmiller was pushing her lawn mower. It was before the bite that Snydmiller's arm was extended over the fence – Trans. 44/40-45/28;
>
> "Q Do you know which side of the fence Ms. Snydmiller's arm was on at that time [the time of the bite]?
> A I couldn't tell you – I just know she was mowing right next to the fence so the arm was probably right on the line, I'm assuming, because the fence – the lawn mower was right against the fence." – Trans. 47/12-15; and
>
> "From my distance I couldn't guarantee it [the hand] was over the fence, but it was definitely, like, to smell or just kind of put it out so, like, it was kind of hoping that he would probably calm down is what I'm assuming." – Trans. 47/33-35

[88] Accordingly, taking into account all of the evidence as a whole I find that Snydmiller was bit on the arm while both she and her arm were on her side of the fence. After Moose had jumped on the fence with his front paws he reached across the fence into Snydmiller's yard and bit her. In making this finding I have applied the principles in *R v W(D)*. For the reasons just provided, I cannot accept that the defence evidence supports the proposition that the bite occurred on the Defendant's side of the fence nor does that evidence raise a reasonable doubt in my mind.

[89] Next, I conclude that that is sufficient to find that Moose was "off the property" in accordance with ss. 13(1) *Bylaw*. A literal reading of that subsection does not require that the dog be fully off the property when the incident occurs. To not give full effect to that interpretation would be to lessen the effectiveness of this section in protecting the safety and health of the public thereby violating one of the purposes of the *Bylaw* as expressed in the first preamble to it, that being "**Whereas**, pursuant to section 7(a) of the *Municipal Government Act*, a council may **pass laws for municipal purposes respecting the safety, health and welfare of people and the protection of people** and property [Emphasis added.]

Paragraph 14(1)(c) Bylaw

[90] With respect to para 14(1)(c) *Bylaw* the only issue raised is provocation, that is ss. 14(2) *Bylaw*. That involves an examination of four different issues:

1) is there an evidentiary basis for provocation;
2) if yes, does that evidence, if accepted, amount, in law, to provocation;
3) if yes, is provocation an "exemption, excuse, qualification or the like"; and
4) if yes, has the Defendant proved provocation on the balance of probabilities.

Each will be dealt with in turn.

i) Evidentiary basis

[91] It cannot be argued that there is evidence of provocation in the Crown's case. Such evidence, if any, must be gleaned from the evidence presented by the Defendant. To summarize, that evidence consists of:

A) The Defendant

> Snydmiller reached over the fence on three occasions to "**try and calm down Moose**" [Emphasis added.] – Trans. 31/32-33;
>
> Three times Snydmiller reached over the fence "**to try and, like, befriend him and that – the extend-your-hand motion that's kind of synonymous with greeting dogs.**" [Emphasis added.] – Trans. 34/7-19; and
>
> In cross examination the Defendant agreed that Snydmiller reached over the fence three times – Trans. 40/23-26.

B) Wobben

> "She [Snydmiller] kind of put her hand out, **almost to look like she was trying to befriend him**, stop him from barking. I saw the hand kind of twice from where I was..." [Emphasis added.] – Trans. 43/30-32;
>
> "She was holding the lawn mower with one hand, but the other hand was wearing, like, a gardening glove or a leather glove or something like that, and she had stuck that out to – **it looked like befriend or just kind of have him sniff, hoping that that would stop him probably from barking.**" [Emphasis added.] – Trans. 45/18-21; and
>
> "From my distance I couldn't guarantee it [the hand] was over the fence, but it was definitely, **like, to smell or just kind of hoping that he would probably calm down** is what I'm assuming." [Emphasis added.] – Trans. 47/33-35.

[92] Accordingly, it can be argued that there is some evidence of provocation – the reaching over the fence by Snydmiller.

ii) Provocation in Law

[93] The next issue is whether that evidence, if accepted, is capable in law of amounting to provocation under ss. 14(2) *Bylaw*. Or to put this in another fashion is there an "air of reality" to the issue of provocation. Taking into account the dictionary definitions of "provoke" and the case authority previously cited and discussed (see paras 31-39 above) it is my view the evidence here is not capable in law of amounting to provocation. There is no "air of reality" to this issue.

[94] The reaching over the fence cannot be looked at in isolation. The description of that reaching, and the reason for it as contained in the evidence presented by the Defendant, is crucial. There are a number of variations of that description and the reason therefore including (for transcript references for the following passages see para 91 above):

1) "try and calm down Moose";

2) “to try and, like, befriend him and that - the extend-your-hand motion that’s kind of synonymous with greeting dogs”;

3) “almost to look like she was trying to befriend him”;

4) “it looked like befriend or just kind of have him sniff, hoping that that would stop him probably from barking”; and

5) “like, to smell or just kind of hoping that he would probably calm down”.

[95] None of these descriptions can be said to be in accord with the dictionary definitions of “provoke” previously set out. That is, they cannot be said “to incite to anger”, “to stir up purposely”, “to stir up, agitate” etc. In fact, they could be described as “friendly, submissive and consummately non-threatening behaviours”, conduct that was found in *Letendre* at para 44 not to amount to provocation.

iii) Exemption, proviso, excuse, qualification or the like

[96] If I am wrong in that respect, I have to then determine, in accordance with the common law reverse onus provision, whether ss. 14(2) *Bylaw* is an “exemption, proviso, excuse, qualification or the like”. That is part of the common law reverse onus provision and is largely established by the words (words that have been cited before but repeated here for convenience) in *Edwards* at 1095: “Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, **subject to provisos, exemptions and the like, then the prosecution can rely on the exception.**” [Emphasis added.]. Effectively what is required is a determination of whether the provision is an “exemption, excuse, qualification or the like” or an essential element of the offence *Hundt v The Queen*, 1971 ALTASCAD 22 (*Hundt*) at paras 9-13, a case cited by the Crown.

[97] Many cases have struggled with this very issue and it can sometimes be an extremely difficult task. In the context of ss. 794 *CC* (and previous versions of the same section) see for example *Hundt* at paras 13-24, *H(P)* at paras 14-15, and *Williams* at paras 16-24. But here, while not easy, it is somewhat less difficult than it might otherwise be.

[98] Cognizance of the grammatical structure of s. 14 *Bylaw* is necessary and important. That section is divided into two different subsections, an indication, obviously not determinative, that ss. 2 *Bylaw* is an “exemption, excuse, qualification or the like”. However, this indication is buttressed by the fact that ss. 1 *Bylaw* can be viewed as a stand-alone provision without requiring any support from ss. 2 *Bylaw*. That is, ss. 1 *Bylaw* evidences an offence in and of itself. Additionally, what ss. (1) *Bylaw* does is create a blanket prohibition and what ss. (2) *Bylaw* does is create an “exception” to that blanket prohibition – see for example *Daniels* at paras 10-15 and *R v Whatmore*, 2011 ABPC 320 at paras 43-44. And finally, ss. 2 *Bylaw* is limited to s. 14 *Bylaw* itself. That is, it is particular to that section and that section alone; it does not apply to the *Bylaw* in general terms. On this last point see *R v Sheehan*, 2003 CanLII 32876 (NL PC) at para 13. All that combined leads to the conclusion that proof of no provocation is not an element of the offence but that provocation is actually an “exemption, excuse, qualification or the like”. That fits in nicely with the general purpose of the *Bylaw* (the safety, health and welfare of people and

the protection of people and property), and the particular importance of the purpose to s. 14 *Bylaw*.

iv) Has the Defendant proved provocation?

[99] Having found that provocation is an "exemption, excuse, qualification or the like" and not an element of the offence I necessarily have to find that the Crown has proved the *actus reus* of this offence beyond a reasonable doubt. None of the other elements of the *actus reus* are in dispute. But as it is convenient to do so here I will carry on to address the issue of provocation in its entirety. Mindful of my analysis that the onus is on the Defendant to prove provocation, I turn now to whether the Defendant has proved that on the balance of probabilities.

[100] I have listened carefully to the evidence of both the Crown and the Defendant. I find that all the witnesses who testified are believable. There is nothing, either in the way that any of them has testified or in how the evidence that they have provided fits within the context of this case as a whole, that leads me to conclude that I should accept one witness's evidence over that of another. That is, I cannot decide which version of the facts, where there is a discrepancy, to believe. Essentially, I am in the same position as was the trial judge in *Goleski,* at paras 15-16. This is one of those rare cases where the outcome is determined on the basis of which party has the onus.

[101] As the only evidence of provocation comes from the evidence presented by the Defendant, and not being able to accept it, it follows that the Defendant has not met her onus. Provocation has not been proved.

Conclusion with Respect to the Actus Reus of the Offences

[102] The only issue concerning ss. 13(1) *Bylaw* is whether the bite occurred off of the Defendant's property. I have found that, although Moose was not entirely off the Defendant's property at the time of the bite, his mouth was. That is sufficient for a violation of that subsection. The Crown has proved all the element of the *actus reus* for this offence beyond a reasonable doubt.

[103] With respect to para 14(1)(c) *Bylaw* the Crown has also proved all the elements of the offence beyond a reasonable doubt. Provocation is not one such element. It is an "exemption, proviso, excuse, qualification or the like" which has not proven on the balance of probabilities by the Defendant either because the evidence presented on this point is not capable in law of amounting to provocation or because that evidence was not accepted.

Has the Defendant Proved the Defence of Due Diligence?

[104] That then leaves only the issue of due diligence.

[105] The Defendant has raised this issue with respect to both offences. As exactly the same analysis applies to both offences for this defence, the offences will be treated collectively and not differentiated.

[106] The Defendant faces the same difficulty for this defence as she did with respect to the provocation defence. To repeat, I am not able to accept the evidence presented by the Defendant on this issue.

[107] On the Crown's evidence due diligence has not been established. Snydmiller described Moose and other dogs in the Defendant's yard as being aggressive to the point where she would not cut her grass unless the Defendant or someone else was in the Defendant's yard to supervise the dogs. Specifically with respect to Moose she stated that he would cause difficulties at the fence: "Snapping, snarling, feet on the fence, barking aggressively." Snydmiller viewed the Defendant's dogs, including Moose, as a threat to her and she was afraid of them. Notwithstanding that Moose had never before come into Snydmiller's yard these issues should have been addressed in some fashion. This is especially so in the context of a low three foot high fence. But on the evidence of Snydmiller they were not.

[108] In light of non-acceptance of the Defendant's evidence that essentially ends the matter. Nevertheless, I will go on to fully deal with this matter. Even if the evidence presented by the Defendant was accepted, I question whether the defence of due diligence has been established on the balance of probabilities on the basis of that evidence. In saying that I am mindful that Moose had never bitten anyone before and that there were no previous incidents between Moose and Snydmiller. However, the evidence presented by the Defendant also highlights a number of other things. First, that Moose had an issue with barking, and on the day in question, but prior to the incident, he was: "barking at the fence" (Trans. 43/24-25). A precursor such as this cannot simply be ignored. As stated by Wobben, the Defendant's boyfriend, "...when Moose is barking, I'm usually telling Kaileigh [the Defendant] that we need to bring the dogs down, put them in or pull them from the fence, because they bark a lot."- Trans. 43/33-34. Second Moose was running freely around the yard at the time of the incident. Third, the fence between the Defendant's yard and Snydmiller's yard was a low fence, being only three feet in height. And finally, of great significance is that it was only after Moose had approached the fence on three occasions in such a fashion that the Defendant had to, on each of those three occasions, try to calm him down, that she decided to take him inside. Previously she had simply moved Moose to another part of the yard. In those circumstances I have grave doubts that the defence of due diligence can be made out on that evidence.

Conclusion

[109] With the repeal of s. 794(2) *CC*, at least in Alberta, the common law reverse onus provision for summary conviction offences is now applicable. As s. 794(2) *CC* was a codification of the common law, the law in Alberta remains essentially the same as it was before the repeal. To be clear, that common law (and the law that is now applicable) is spelled out in the case of *Edwards*. Of particular importance are the passages at p 1095 of that case, the passages that have been set out at para 62 of this decision. To summarize, the onus is on a defendant to prove an "exemption, proviso, excuse, qualification or the like" on the balance of probabilities.

[110] In this case the Crown has proved the *actus reus* of both of these offences beyond a reasonable doubt. With respect to ss. 13(1) *Bylaw* Moose was "off the property" at the time of the incident. With respect to para 14(1)(c) *Bylaw* lack of provocation is not an element of the offence; provocation is an "exemption, proviso, excuse, qualification or the like" and therefore the onus is on the Defendant to establish that (i.e. the application of ss. 14(2) *Bylaw*) on the

balance of probabilities. She has not done so, either because the evidence presented by the Defendant did not amount to provocation under ss. 14(2) *Bylaw* or because that evidence could not be accepted. The Defendant has also not proved the defence of due diligence for either of these offences.

[111] Accordingly, I find the Defendant guilty of both offences.

Heard on the 9th day of January, 2020, December 16, 2020, May 20, 2021, and May 21, 2021.
Dated at the City of Edmonton, Alberta this 21st day of May, 2021.

Arnold Schlayer
Justice of the Peace

Appearances:

K. Johnson and L. Ramaswamy
for the Crown

W. Smith
for the Defendant